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UNITED STATES
CIRCUIT COURTS OF APPEALS
REPORTS

WITH KEY-NUMBER ANNOTATIONS

WITH TABLE OF CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS WHICH HAVE BEEN PASSED UPON BY THE SUPREME COURT OF THE UNITED STATES

VOLUME 169

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[1] Died May 8, 1919.
[2] Appointed July 22, 1919, to succeed Joseph T. Johnson.
[3] Died September 26, 1919.
[4] Resigned August, 1919.
[5] Appointed August 5, 1919.
[6] Died September 15, 1919.
[7] Retired pursuant to the statute.
[8] Died September 24, 1919.

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[9] Retired pursuant to the statute.
[10] Appointment confirmed October 13, 1919, vice Hon. David P. Dyer, retired.

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Thompson v. U. S., 169 C. C. A. 264. Writ of certiorari. Certiorari denied, November 24, 1919, 40 S. Ct. 57.

Todd v. Lippincott, 169 C. C. A. 273. Writ of certiorari. Certiorari denied, October 20, 1919, 40 S. Ct. 12, 250 U. S. 672, 64 L. Ed. —.

U. S. v. Birmingham Trust & Savings Co., 169 C. C. A. 502. Writ of certiorari. Certiorari denied, November 17, 1919, 40 S. Ct. 56.

U. S. v. Poland, 145 C. C. A. 630. Writ of certiorari. Decree reversed, January 5, 1920, 40 S. Ct. 127.

U. S. v. Seuffert Bros. Co., 164 C. C. A. 163. Error. Writ of error dismissed, January 12, 1920, 40 S. Ct. 178.

Vandenburgh v. Concrete Steel Co., 169 C. C. A. 138. Writ of certiorari. Certiorari denied, October 13, 1919, 40 S. Ct. 11, 250 U. S. 664, 64 L. Ed. —.

Virginian R. Co. v. Halstead, 169 C. C. A. 444. Writ of certiorari. Certiorari denied, October 13, 1919, 40 S. Ct. 10, 250 U. S. 660, 64 L. Ed. —.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS

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(257 Fed. 715)

HANSON v. ROYAL INS. CO.

(Circuit Court of Appeals, Sixth Circuit. December 3, 1919.)

No. 3131.

1. INSURANCE ⟸177—FIRE INSURANCE—POLICY—CONSTRUCTION—"EXPIRATION."

Where fire policy provided that if at the expiration of the policy, or if it should be canceled by the assured, the average time cotton under liability has been at risk shall exceed two days, the assured should pay an additional premium, and the insurer treated the policy at an end because the receiver was appointed for the assured, the insurer's claim to the additional premium can be sustained only on the ground that the receivership was equivalent to a cancellation of the policy by the assured; the term "expiration" in such a contract meaning expiration by lapse of time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Expiration.]

2. INSURANCE ⟸146(3)—FIRE POLICY—AMBIGUITY.

Where, under a fire policy, it was questionable whether the insurer was entitled to the additional premium claimed, the provisions creating an ambiguity, insurer has the burden of explaining the same.

3. INSURANCE ⟸232—FIRE POLICY—ADDITIONAL PREMIUM—"CANCELLATION."

Where a fire policy provided that it should be void if any change other than by death of assured should take place in the interest, title, or possession of the subject of the insurance, and on a receiver being appointed for the assured the insurer declared the policy void, *held*, that such termination of the policy did not amount to a cancellation of the policy by the assured, so as to entitle the insurer to certain additional premiums.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cancellation.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

The claim of the Royal Insurance Company was allowed in receivership proceedings against the Gulf Compress Company, and C. C. Hanson, the receiver, appeals. Order reversed, and cause remanded, with directions.

D. H. Bynum, of Indianapolis, Ind., for appellant.

Edward B. Klewer, of Memphis, Tenn., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. The case, shortly stated is this: On September 1, 1907, the insurance company, by a series of policies, insured the compress company, during one year from that date, on account of its liability to carriers for loss or damage by fire upon cotton in bales at certain locations stated in the respective policies. The initial premiums were payable monthly at the rate of 1¼ cents for each bale passing through the compress, as shown by certain monthly statements required from the compress company. On May 30, 1908, while the policies were still in force, the compress company's property passed into the possession of a receiver appointed by the court below

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in a creditor's suit. Each policy contained an agreement that, "unless otherwise provided by agreement indorsed hereon or added thereto," it "shall be void if * * * any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise, or if this policy be assigned before a loss."

[1] On June 8, 1908, the insurance company gave notice to the carriers that—

"The Gulf Compress Company having been placed in the hands of a receiver, the policies * * * are null and void from and after the appointment of the receiver, and such action itself avoided the policies."

The premium agreement provided that—

"If at the expiration of the policy, or if the policy be canceled by the assured, the average time cotton under liability has been at risk shall exceed two days, the assured agrees to pay to the insurance company an additional premium of one-half cent per bale for each day or fraction thereof in excess of two days, on each bale of cotton for which the assured has been liable to the transportation lines."

The claim of the insurance company for this additional premium was allowed in the receivership proceeding. The propriety of this allowance is the only question here.

The only ground on which it can even plausibly be contended that the insurer is entitled to the additional premium is that what was done amounted to a cancellation of the policy "by the assured." That the receivership did not work an "expiration" of the policy within the meaning of that contract is clear. The term "expiration," as ordinarily understod in insurance contracts, and where not otherwise defined, means expiration by lapse of time. The policy contains nothing varying this ordinary meaning. Indeed, in the premium agreement quoted the expiration and cancellation of the policy are treated as wholly distinct from each other.

[2, 3] The insurer's actual contention is that the appointment of a receiver, and the latter's possession and operation of the compress company's plant effected a "change * * * in the interest, title, or possession of the subject of insurance," and that such avoidance of the policy, occurring as it did, through no fault of the insurer, amounted to a cancellation "by the assured." But were we to assume, for the purposes of this opinion, that the receivership did avoid the policies, we yet would be unable to agree with the contention that such avoidance amounted to a cancellation by the assured within the meaning of the premium provision; that is to say, within the intention of the parties. The additional premium is provided in either of but two contingencies—"expiration" of the policy or its cancellation "by the assured." The contingency of avoidance by the existence or occurrence of any one of the dozen or more conditions which in this, as in all modern fire insurance policies, effect avoidance, or the "ceasing" of the policy under another provision, are wholly omitted, although the natural course would have been to mention them if meant to be included. Such omission, in the view most favorable to the insurer, created an

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ambiguity, the burden of explaining which was on the insurer, as the one who prepared and put out the contract. This burden has not been sustained.

The other provisions of the policy lend no support to the insurer's construction of the expression "canceled by the assured." So far as pertinent, they are opposed to it. The policy provides for its own cancellation in but one of two ways, viz. "at the request of the assured" at any time or "by the company" on five days' notice. Moreover, the return premium provision recognizes a distinction between cancellation and avoidance of a policy in the words:

"If this policy shall be canceled as herein provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned."

For if the three contingencies named were, in the minds of the parties, one and the same thing, there was no occasion to mention but one.

The omission from the premium provision of the contingency of the policy becoming "void" for any of the numerous causes declared to produce that effect is significant. We are constrained to the opinion that cancellation "by the assured" means a cancellation "at the request of the assured" in fact. The latter, so far from requesting cancellation, in fact tried to prevent it by assigning the policies to its receiver, consent to which was refused by the insurer, unless the receiver would guarantee payment of certain claimed premiums accruing before the receivership.

So far as authority for these views may be thought necessary, Davison v. Insurance Co., 189 Pa. 132, 136, 42 Atl. 2, is more or less in point. The conclusion we have reached makes it unnecessary to consider the other defenses urged by the receiver.

The order of the District Court is reversed, and the record remanded to that court, with directions to disallow the claims, so far as involved in this appeal.

(257 Fed. 717)

WATTS et al. v. CRABB et al.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3207.

1. EQUITY ⟸345—EVIDENCE—VERIFIED ANSWER.

The doctrine that, where an answer under oath is not waived in the bill, the denials in a verified answer as to all matters within the personal knowledge of the party answering must be overcome by the evidence of witnesses, or by one witness corroborated by circumstances equivalent in weight to another witness, did not rest upon any specific rule promulgated by the Supreme Court, but upon the general equity practice.

2. EQUITY ⟸345—VERIFIED ANSWER—EVIDENCE TO OVERCOME.

Regardless of any change which the new equity rules of 1912 might have had on a sworn answer, a decree for complainants in a suit to set aside deeds on the ground that grantor was old and feeble and unduly influenced *held* not open to attack on the theory that a verified answer was filed and such decree could not be based on the testimony of a single wit-

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ness; it appearing that the testimony was adequate to support the decree, though more than one witness, or one witness corroborated by circumstances equivalent in weight to another witness, be deemed required.

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Bill by Jerusha Crabb and John Crabb against Homer I. Watts and others. From a decree for complainants (249 Fed. 357), defendants appeal. Affirmed.

The appellee Jerusha Crabb was the daughter of Thomas Watts, who died intestate on April 20, 1914. The appellants Homer I. Watts and Marvel Watts were her half-brothers, and they and she were the only heirs at law of the estate of Thomas Watts. The appellees brought suit in the court below to set aside two deeds purported to have been executed by Thomas Watts on April 14th, four days before his death, by one of which deeds 120 acres of land were conveyed to Jennie Anderson Watts, wife of said Marvel Watts, and by the other deed 320 acres were conveyed to Vernita Watts, the daughter of Marvel Watts, which deeds were not recorded until after the death of Thomas Watts. The complaint alleged that Thomas Watts, at the time of the execution of the deeds, was very old and feeble in mind and body, and incapable of doing business or of making a conscious or intelligent disposition of his property, and that the deeds were without consideration, and were obtained by fraud and undue influence upon the part of the appellants, while said Thomas Watts was sick in bed at the home of Homer Watts; that the only estate of the decedent, aside from the land so deeded, consisted of 80 acres of incumbered land, the value of which was barely sufficient to pay the mortgage thereon and the expenses of the funeral and the administration of the estate of Thomas Watts. The answer denied that Thomas Watts was so feeble in mind or body as to be incapable of doing business or disposing of his estate, and denied the allegation of undue influence, or of any influence, upon him to induce the execution of the deeds. The court, upon the issues and the evidence, sustained the allegations of the complaint, and decreed that the conveyances be set aside.

Will M. Peterson and James H. Raley, both of Pendleton, Or., for appellants.

Alfred S. Bennett, of Salem, Or., and James A. Fee, of Pendleton, Or., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellants point to the fact that the bill of the appellees called for an answer under oath, and that the appellees answered under oath, and they invoke the rule that either two witnesses or one witness with corroborating circumstances are required to outweigh an answer asserting a fact responsive to the bill. The new equity rules of 1912 (198 Fed. xix, 115 C. C. A. xix), which were in effect after February 1, 1913, abrogated all prior equity rules. They contain no provision that an answer shall be verified, and they make no reference to the probative effect of an answer under oath, where the oath is not waived. Campbell v. Northwest Eckington Co., 229 U. S. 561, 33 Sup. Ct. 796, 57 L. Ed. 1330, cited by the appellants, is a case in which the issues were made and the cause was tried and decided before the new equity rules were promulgated. The doctrine that where an answer under oath is not waived in the bill, the denials in a verified answer as to all matters within the personal knowledge of the party answer-

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ing must be overcome by the evidence of two witnesses, or by one witness corroborated by circumstances equivalent in weight to another witness, did not rest upon any specific rule promulgated by the Supreme Court, but upon a general rule of equity practice, as stated in 2 Story's Equity, § 1528.

[2] In the present case it is not necessary to decide whether the new equity rules have abrogated that rule of practice, for here the essential facts to establish the appellees' case do not rest upon the testimony of any single witness. Thus the allegation that Thomas Watts was old and feeble in mind, and sick and mentally weak and easily influenced, was sustained by the testimony of several witnesses for the appellees, and the finding of fact indicating undue influence on the part of the appellants is deducible from the testimony of witnesses and the surrounding circumstances. The allegation to which the appellants refer, that "Homer I. Watts and his brother have some arrangement between themselves by which they are to be the real owners and receive the benefits from such land," although it was not proven, is not a material allegation to the relief which is sought in the bill.

About four years before his death, Thomas Watts had executed a will in which he bequeathed $200 to his daughter Jerusha, and divided the remainder of his estate between his two sons. About the 16th of March, 1914, he visited his daughter at her home, and remained there until April 10, 1914. While he was there he sent for his will. After having it in his possession a few days, he destroyed it, and stated to his daughter and his granddaughter, "Now it is done, and they will all share equally." Thereafter he was taken seriously ill, and on April 10th Marvel Watts came and carried him to Homer's house, and there he remained in charge of a nurse and the physician attending him until his death, and there he executed the deeds which are the subject of the suit. Jerusha, her husband, and her daughter all testified in substance that, when Marvel Watts came to take his father away, the latter said:

"If you have come after me to take me down to make any papers, or sign any papers, I won't go e'er a step."

To which Marvel answered:

"Father, we have no such intention as that. It shall be divided equal. I won't influence you to sign anything."

Marvel denied this conversation, but the court below was convinced of the truthfulness of the appellees' testimony. The court below heard all of the testimony in open court. That careful consideration was given to the testimony is evidenced by the opinion which is found in the record. The court found, in the testimony of the nurse and the testimony as to Watts' physical and mental condition, together with the testimony of the defendants, that the deeds were procured from Thomas Watts by fraud and deception and undue influence, and by taking advantage of his enfeebled mental and physical condition, that the deeds were not the voluntary and intelligent act of Thomas Watts, and that in equity and good conscience the deeds were fraudulent and void. We find in the record no ground to disturb that conclusion.

The decree is affirmed.

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(257 Fed. 720)

THE GANOGA.

THE BESSIE.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 177.

TOWAGE ⟸11(10)—LIABILITY FOR INJURY TO TOW—INSECURE MOORING.

A tug, which left a number of boats in tow fastened to a pier by a slip line over a pile, while she went after others, *held* in fault for injury to one of the boats by collision with another pier after the tow had gone adrift on the rising tide and in a high wind, which caused the line to slip over the top of the pile, on the ground that under the circumstances she should have seen that the tow was more securely fastened.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Red Star Towing & Transportation Company against the steam tug Ganoga, the Lehigh Valley Transportation Company, claimant, with the boat Bessie, McWilliams Bros., Incorporated, claimant, impleaded. Decree for claimants, and libelant appeals. Reversed.

Burlingham, Veeder, Masten & Fearey, and Chauncey I. Clark, all of New York City (Charles E. Wythe, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (Dix W. Noel, of New York City, of counsel), for the Ganoga.

Herbert Green, of New York City, for the Bessie.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. February 3, 1917, the tug Ganoga hung up a flotilla of eight light canal boats on a pile at the lower corner of the river end of the Gamecock Pier, Jersey City, to become a part of a larger tow to be subsequently taken to Perth Amboy. The master of the tug ordered the captain of the port hawser boat Bessie, which was nearest the pier, to make his line fast from her bow to the pile, and this was done; the eye of one end of the line being fast to the boat's bitts, the other end, after passing around the pile, being brought back to the bitts and made fast. This is called a slip line, and is generally used because it can be easily let go from the boat without any help from the pier when the tow is ready to start. The tug then left to get more boats, and when she returned found that the whole flotilla had gone adrift and had collided with Pier 1, North River, the boat Red Star No. 19 sustaining damage, for which this libel was filed against the tug. The tug brought in the boat Bessie under the fifty-ninth rule, charging her with fault in the manner of making fast, and charging both her and the Red Star No. 19 with fault for not having anchors.

The time of the arrival of the flotilla at the Gamecock Pier and the time of the return of the tug, when she discovered the drifting, are important with reference to the stage of the tide and the force of the wind. The master of the tug says he arrived at 10:30 p. m. of Feb-

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ruary 3d on half flood and upon his return at 1 a. m. of the 4th he found the boats had got adrift. As it was not low water until midnight of the 3d, he could not have arrived at any stage of the flood tide until after midnight. A record of the times of the tug's movements being kept, the claimant could have proved them exactly, if it had chosen to do so. Therefore we adopt the testimony of the master of the Red Star No. 19 that the flotilla arrived at midnight of the 3d and got adrift about two hours afterwards on the rising tide.

The testimony is uncontradicted that when the flotilla was made fast a high wind was blowing it out into the stream, and the weather report shows that at midnight of February 3d the wind was blowing from the southwest at 39, and at 2 a. m. of the 4th at 36, miles an hour, a moderate gale by the Beaufort scale. It is also uncontradicted that the deck of the Bessie was above the top of the pile around which her line was passed, and that the line did not part. The captain of the Bessie testified that the deckhand of the tug passed this line around the pile, and that he saw him pass it under the line of another boat lying at the pier, whose line had a bight around the pile, and that when the tow was brought back he saw that the other boat had merely a slip fast. To accomplish such a thing it would be necessary for those on the other boat to let go their own line and for some person or persons on the pier to get the bight of the line free from the pile and hold the boat against the wind and sea until some other people lifted the Bessie's line from the pile and held the eight boats against the wind and sea until the line of the other boat had been slipped around the pile and the line of the Bessie replaced above it.

The District Judge held that it was physically impossible for the Bessie's line to have slipped over the pile; i. e., that it must have been removed by human agency and replaced in the manner above described. If he was right in this, then neither the Bessie nor the tug would have been at fault. We reject, however, what seems to us to be an extraordinary, motiveless, and almost incredible explanation, in favor of the very natural one, viz. that the Bessie's line led down to the pile and around it, over the line of the other boat, and the Bessie, by tossing and surging on the rising tide, passed it over the top of the pile.

It is quite true that the flotilla was made fast in the usual way by the Bessie and that her line did not part; also that the tug was not an insurer of the tow, but only owed it ordinary care. If the Bessie was at fault in making fast, the tug would not be responsible for any damage caused to her thereby, though it might be to the other boats. McWilliams v. P. & R. Co., 203 Fed. 859, 122 C. C. A. 84. The Bessie's line was good, did not part, and was made fast in the usual way. The negligence, if any, was in the failure to foresee that the Bessie, tossing and surging in such wind and weather, with her deck higher than the top of the pile, would be likely on the rising tide to slip the line over the pile. Under these circumstances we think ordinary care required that a better fast than the usual slip fast should have been made, and that the tug was at fault for not seeing to it, whereas boatmen could not be held at fault for want of such nautical skill.

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The claimant of the tug does not press the charge that the Bessie had no anchor, and Red Star No. 19 had none which could be used, so that we need not consider the question.

The decree is reversed, and the court below directed to enter the usual decree in favor of the libelant.

(257 Fed. 722)

In re HUDFORD CO. OF NEW YORK, Inc.

Petition of ZALKIN.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 213.

BANKRUPTCY ⇐172—PROPERTY PASSING TO TRUSTEE—ASSIGNMENT OF CLAIMS AGAINST UNITED STATES.

Under Rev. St. § 3477 (Comp. St. § 6383), making void any assignment or transfer of an unallowed claim against the United States, a contract under which petitioner furnished automobile parts to bankrupt, to be used in filling a contract with the government, and which provided that all warrants received by bankrupt under its contract should be indorsed by it as agent and delivered to petitioner, *held* void, and such warrants received by the trustee *held* to inure to the benefit of general creditors.

Petition for Revision of Order of the District Court of the United States for the Southern District of New York.

In the matter of the Hudford Company of New York, Incorporated, bankrupt. Petition by Harry Zalkin, trustee, to revise order of District Court. Reversed.

Nathan Friedman, of New York City, for trustee.

Edwards, O'Loughlin & George, of New York City (David G. George and Charles H. Edwards, both of New York City, of counsel), for H. H. Babcock Co.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a reclamation proceeding in bankruptcy. The petition of the H. H. Babcock Company to the referee alleges that on August 28, 1917, it agreed to furnish to the Hudford Company certain automobile bodies and fenders to be used by it in carrying out a contract with the United States government; the Hudford Company agreeing that title to the bodies and fenders should remain in the petitioner until delivery to the government, the warrants to be issued therefor to become the property of the petitioner and to be collected, indorsed and forwarded by the Hudford Company to the petitioner as its agent, any sum over the contract price of the bodies and fenders to be applied to the payment of any balance then due by the Hudford Company to the petitioner, the Hudford Company assigning to the petitioner all its right, title, and interest in its contract with the government and agreeing to give such further assurance to the petitioner as it might deem necessary to carry out the agreement.

The petitioner thereupon furnished 56 automobile bodies and 26

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pairs of fenders to the Hudford Company, which it delivered to the government. October 26, 1917, the Hudford Company was adjudicated a bankrupt and its trustee came into possession of government warrants to its order for the sum of $4,370, which he has collected and out of which he has refused to turn over the sum of $4,002.95, due to the petitioner under the contract of August 28, 1917. The prayer of the petition was that the trustee be required to turn over the said amount with interest to the petitioner.

The referee denied the petition, with costs, on the ground that the agreement of August 28, 1917, made before allowance by the government of the Hudford Company's claims and before issue of any warrants, was in contravention of section 3477, Rev. St. U. S., which reads as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

The H. H. Babcock Company having filed a petition for review in the District Court, the District Judge held that although the agreement of August 28, 1917, was forbidden by section 3477, nevertheless it constituted a conditional sale, binding the proceeds of the warrants for the goods in the hands of the trustee, and as the property belonged to the petitioner, and not to the bankrupt, the transfer within four months of the filing of the petition in bankruptcy was not a preference under section 60b of the Bankruptcy Act.[1] Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. We think the learned judge erred. The Babcock Company knew that its title to the bodies, etc., could not be reserved, and was not intended to be reserved, as against the government, and that the only security it could expect was in the claim when allowed, and in the warrants to be issued by the government to the Hudford Company. But the Supreme Court has in the most explicit and unmistakable terms pronounced all such agreements, direct or indirect, absolutely void under section 3477. National Bank of Commerce v. Downie, 218 U. S. 345, 31 Sup. Ct. 89, 54 L. Ed. 1065, 20 Ann. Cas. 1116. In that case the bank had advanced money to the bankrupt upon the security of 16 claims against the United States for materials furnished by the bankrupt, none of which claims had been allowed, and for none of which warrants had been issued. The court held that the assignments were absolutely void, and the bankrupts were still the owners of the claims, which passed, not to the bank, but to their general creditors, as if no assignments had been made. In view of this decision

[1] Act July 1, 1898, c. 541, 30 Stat. 562 (Comp. St. § 9644).

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the Court of Appeals of New York in Manhattan Co. v. Paul, 216 N. Y. 481, 111 N. E. 76, overruled its former decision to the contrary in York v. Conde, 147 N. Y. 486, 42 N. E. 193, and held that the plaintiff could not recover against the defendant for conversion under the following circumstances: The plaintiff advanced moneys to a corporation upon the security of an assignment by it of claims against the United States government which the defendant, the corporation's treasurer, agreed, as agent of the plaintiff, to collect, indorsing the warrants to it, instead of which he indorsed and deposited them in the borrower's bank. This was not even a case of bankruptcy, involving a preference of the lender over general creditors. Such results may appear inequitable, but the act of Congress as interpreted by the Supreme Court make them ineluctable.

The decree is reversed.

(257 Fed. 724)

SHILTER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3252.

1. INDICTMENT AND INFORMATION ⟸202(2, 5)—DEFECTS—CURE BY VERDICT.
A defendant who waits until after verdict before making objection to the sufficiency of the indictment, waives all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn; but defects in substance, or failure of the indictment to state facts to constitute an offense, are not cured by verdict.

2. ARMY AND NAVY ⟸40—ESPIONAGE ACT—INDICTMENT—SUFFICIENCY.
An indictment charging that defendant, in a named city and between January and May, made seditious statements with intent denounced by the Espionage Act (Comp. St. 1918, § 10212a et seq.), and thereby willfully, unlawfully, and knowingly attempted to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States, is insufficient, where there was nothing to connect the acts of defendant directly or indirectly with such military or naval forces.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Edward S. Farrington, Judge.

Karl Shilter was convicted of attempting to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States, in violation of the Espionage Act, and he brings error. Reversed and remanded, with instructions to discharge defendant.

Arnold W. Liechti, of San Francisco, Cal., for plaintiff in error.

Annetta A. Adams, U. S. Atty., of San Francisco, Cal., and John W. Preston, Sp. Asst. Atty. Gen., and P. H. Johnson, Asst. U. S. Atty., of Sacramento, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted under an indictment which charged that on "divers dates between the

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1st day of January, 1918, and the 6th day of May, 1918," at Sacramento, Cal., he did "then and there unlawfully, willfully, and knowingly attempt to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States, with the intent on the part of him, the said defendant, to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies; that is to say, the said defendant did then and there make the following seditious statements, to wit." Then follow the statements. There was no demurrer to the indictment, no exceptions were taken at the trial, and no motion in arrest of judgment was made.

[1] The plaintiff in error raises in this court for the first time the objection that the indictment is fatally defective for want of averments setting forth the circumstances under which the seditious utterances were made and the persons to whom they were made. Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390, is authority for the proposition that a defendant who waits until after verdict before taking an objection to the sufficiency of the indictment waives all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn. We take that decision as expressing in full the nature of the objections to an indictment which may be waived by nonaction in a trial court, objections to the form in which the elements of the crime are stated, and objections to the fact that the indictment is inartificially drawn; and it follows that objections which affect the substantial rights of the defendant are not thus waived, and they may be presented for the first time on writ of error. "Defects in substance are not cured by verdict" (22 Cyc. 485), nor is a failure to state facts sufficient to constitute an offense cured by verdict (22 Cyc. 487). The most that can be claimed in the way of waiver is that it is too late to urge an objection in an appellate court, "unless it is apparent that it affected the substantial rights of the accused." Holmgren v. United States, 217 U. S. 509, 523, 30 Sup. Ct. 588, 591 (54 L. Ed. 861, 19 Ann. Cas. 778); United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; Morris v. United States, 168 Fed. 682, 94 C. C. A. 168. In Oesting v. United States, 234 Fed. 304, 148 C. C. A. 206, this court said:

> "By the defendant's failure to demur to an indictment, or to enter a motion to quash, or a motion in arrest of judgment after verdict, he waives his right to object in an appellate court to any matter which goes to the form in which the offense is stated; but he does not waive the right to raise the objection that the indictment is lacking in some essential element to constitute the offense which is charged."

[2] There is nothing in the indictment here to connect the acts of the accused directly or indirectly or in any way with the military or naval forces of the United States, and therefore there is nothing to advise a court that an offense has been committed against the United States. All that the indictment charges is that the defendant in a named city and at some time between January and May made certain seditious statements, with the intent denounced by the Espionage Act

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(Act June 15, 1917, c. 30, 40 Stat. 217 [Comp. St. 1918, § 10212a, et seq.]), and thereby unlawfully, willfully, and knowingly attempted to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States. Such an indictment is insufficient, we think, to sustain a judgment of conviction.

The judgment is reversed, and the cause is remanded to the court below, with instructions to discharge the plaintiff in error.

(257 Fed. 726)

WESTINGHOUSE ELECTRIC & MFG. CO. v. BINGHAMTON RY. CO.

In re PHELPS et al.

(Circuit Court of Appeals, Second Circuit. April 29, 1919.)

No. 238.

JUDGMENT ⊂⊃713(1)—PERSONS CONCLUDED—ORDER INSTRUCTING RECEIVER.

Findings of fact and law, stated in an order of a federal court directing its receiver for an electric railway company, operating under franchises from different municipalities, to apply to the state Public Service Commission for an increase of rates of fare, *held* not an adjudication binding upon the municipalities.

Appeal from the District Court of the United States for the Northern District of New York.

Suit in equity by the Westinghouse Electric & Manufacturing Company against the Binghamton Railway Company. The City of Binghamton and Town of Union appeal from an order made on application of William G. Phelps, receiver. Appeal dismissed.

For opinion below, see 255 Fed. 378.

John Marcy, Jr., Corp. Counsel, and Neil G. Harrison, Asst. Corp. Counsel, both of Binghamton, N. Y., for appellant city of Binghamton.

Edwin H. Moody, of Binghamton, N. Y. (Douglas V. Ashley, of Binghamton, N. Y., of counsel), for appellant town of Union.

Curtiss, Keenan & Tuthill, of Binghamton, N. Y. (Abram J. Rose, of New York City, of counsel), for receiver.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. The receiver of the Binghamton Railway Company applied to the District Court for the Northern District of New York, which appointed him, for an order authorizing him to apply to the Public Service Commission of the state of New York, Second District, for an increase of rates of fare from 5 cents to 7 cents per passenger and an order holding that the consents of the city of Binghamton, village of Port Dickinson, Johnson City, Endicott, Union, and town of Union were not necessary to the validity of such an increase, and that they show cause why the prayer of the petition should not be granted.

The municipalities appeared specially on the return day to object to the jurisdiction of the court, on the ground that the question of

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raising rates must be submitted to and determined by the Public Service Commission primarily, and that the railway company was under contract with the municipalities to carry at 5 cents per passenger, which contract rate could not be changed by any one without their consent, in accordance with the decision of the Court of Appeals in the Quinby Case, 223 N. Y. 244, 119 N. E. 433. The District Judge overruled these objections and granted the order to show cause, whereupon the municipalities thereafter took part in the proceedings before him. This was, under the circumstances, no waiver of their objections to the jurisdiction.

In considering the prayer of the petition, the District Judge would naturally need to satisfy himself: First, that an increase in rates was proper and necessary; second, that the relations between the railway company and the municipalities were such that the Public Service Commission, if applied to, would have jurisdiction consistently with the decision of the Court of Appeals of the state of New York in the Quinby Case, supra.

January 22, 1919, after a hearing, the District Judge entered an order, from which the city of Binghamton and the town of Union take this appeal.

The order departs from the requirements of equity rule 71 (198 Fed. xxxviii, 115 C. C. A. xxxviii), in that it begins by the recital of all the procedural steps taken in the proceeding, follows this with a statement of the evidence and a finding of fact thereon as to the cost of carrying passengers, followed by a conclusion of fact that the rate ought to be increased, followed by a conclusion of law that the company's franchises, properly construed, do not constitute a contract fixing the rates of fare.

We think the Public Service Commission, if applied to by the receiver, would have jurisdiction to decide independently these findings of fact and law set forth in the order, and that they can only be regarded as enabling the court to intelligently instruct its receiver in respect to an application to be made to the Public Service Commission. The order in these respects does not constitute res adjudicata as to the municipalities at all.

The only part of the order which we think material on this appeal is article 8, which reads:

"Eighth. That in view of the facts and existing conditions, which are liable to continue, and so far as human foresight can determine will continue for at least two years without substantial change, the receiver, William G. Phelps, is therefore hereby ordered and directed to apply to the Public Service Commission, Second District, of the state of New York, for an order authorizing an increase in the rate of fare to be charged by the Binghamton Railway Company from five cents to six cents, to be in operation during the continuance of the war and for two years thereafter, and to incur the necessary expense of such application."

This being purely discretionary, the appeal is dismissed, with costs.

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(257 Fed. 728)

THE THOMAS J. O'BRIEN.

THE PERTH AMBOY.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

Nos. 220, 221.

COLLISION ⇐95(2)—MEETING TOWS—FAULTS.

Two tugs, with tows, meeting and passing at Throgg's Neck at the same time as the passing of another tow, both *held* in fault for a collision between the tows; one for failing to give more room for the other tows to pass, and the other for not slowing when it was apparent that the space between the other tows was not wide enough for safe passage.

Appeals from the District Court of the United States for the Southern District of New York.

Suits for collision by the Lehigh Valley Transportation Company and by Lewis J. Schussler against the steam tug Thomas J. O'Brien, O'Brien Bros., claimants, with the steam tug Perth Amboy impleaded. Decree holding the Perth Amboy solely in fault, and her claimant appeals. Modified.

On a March evening, after running lights were lit, but before night had really set in, with the tide flood and the wind strong from the northwest, the ocean-going tug Perth Amboy, bound into New York Harbor, was approaching Throgg's Neck with a tow whose length from bow of tug to stern of last boat was approximately 900 feet. At the same time the tug Gallagher was also approaching Throgg's Neck from New York. She had in tow five light sand scows arranged tandem in such wise that from the bow of the tug to the end of the last boat was not over 700 feet. Simultaneously the tug O'Brien, with one boat on a hawser (length of tow measured as above not over 300 feet), was traveling in the same direction as the Gallagher, slightly astern of that tug's tow, and overtaking the Gallagher rather rapidly.

For the heaviest vessels of this flotilla the channel off Throgg's Neck is upwards of three-eighths of a mile wide, and all boats either entering or leaving Long Island Sound and following the customary channel must round the red buoy off Throgg's Neck. The Gallagher and Perth Amboy saw each other timely and agreed to pass starboard to starboard. Consequently the Gallagher kept as close to the Throgg's Neck side of the channel as was proper and rounded the red buoy close to; but the Perth Amboy scarcely changed her course. She did go slightly to port, but substantially navigated as she would have done, had neither the Gallagher nor the O'Brien been about to pass her. Some time after the exchange of whistles between Perth Amboy and Gallagher, similar whistles were blown by the Perth Amboy and O'Brien.

While rounding the red buoy aforesaid, the wind naturally caused the light tow of the Gallagher to stream over toward the Perth Amboy's course, while the same wind, acting on the Perth Amboy's tow before she rounded the buoy, tended to keep that tow in line with its own tug. Thus, while the tugs Perth Amboy and Gallagher passed each other with a good clearance, their tows were bound to pass by a comparatively small margin, and there was nothing to prevent the O'Brien perceiving that such would be the case. Nevertheless the O'Brien did not keep behind the Gallagher, but continued into the narrow, and probably narrowing, channel way between the two tows. In result her tow came in collision with one of the boats in charge of the Perth Amboy, both vessels were injured, and these libels were filed to recover damages therefor.

The Perth Amboy and her tow are owned by the same corporation. The court below held the Perth Amboy solely at fault, and dismissed the libel of

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her owners, and sustained that of the owner of the O'Brien's tow against the Perth Amboy alone. Thereupon the owner of the latter tug took these appeals.

Harrington, Bigham & Englar, of New York City (George E. Hargrave, of New York City, of counsel), for the Lehigh Valley Transportation Co.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for The Thomas J. O'Brien.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. We agree with the court below that the Perth Amboy was at fault. She sought and understood the intention of both the Gallagher and O'Brien. There was no reason why she should not have given them both room to make a starboard to starboard passage; there was plenty of water and plenty of time. A majority of this court, however, are also of opinion that the O'Brien was at fault, because she saw, or ought to have seen, that the Perth Amboy was not giving her as much room as she needed under existing conditions of wind and tide, there was no reason for her endeavoring to pass the Gallagher while rounding Throgg's Neck, and she therefore navigated negligently under the circumstances in endeavoring to pass between the two other tows. It is a case of close shaving, and The Volunteer, 242 Fed. 921, 155 C. C. A. 509, is applicable.

The decrees appealed from are modified, so as to hold the O'Brien also at fault, and the causes remitted, with directions to enter decrees not inconsistent with this opinion. The appellant will recover the costs of this court.

(257 Fed. 729)

FIRST NAT. BANK OF CINCINNATI v. BEAMAN et al.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1918.)

No. 3165.

TAXATION ⇐11—BANK STOCK—EXCLUSION FROM ASSETS OF FEDERAL RESERVE BANK STOCK—STATUTE.

Despite Federal Reserve Act Dec. 23, 1913 (Comp. St. §§ 9785–9805), under Rev. St. § 5219 (Comp. St. § 9784), stockholders of a national bank were not entitled, for purposes of the assessment of state, county, and municipal taxes, to any deduction of the value of their holdings on account of the bank's holdings of Federal Reserve Bank stock.

Appeal from the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by the First National Bank of Cincinnati against Edmund S. Beaman, Auditor, and Charles Cooper, Treasurer, of Hamilton County, Ohio. From a judgment for defendants (First Nat. Bank of Cincinnati v. Durr, 246 Fed. 163), plaintiff appeals. Affirmed.

John C. Healy, of Cincinnati, Ohio, for appellant.

W. M. Locke and Smith Hickenlooper, both of Cincinnati, Ohio, for appellees.

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Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

PER CURIAM. Plaintiff in error brought suit to restrain the collection of state, county, and municipal taxes assessed by the taxing authorities of Hamilton county, Ohio, under sections 5407 and following of the General Code of Ohio, against the stockholders of plaintiff bank upon the shares of the capital stock of that bank held by such stockholders, respectively, upon the contention that the assessments were unlawful, in that, in valuing the shareholdings there had not been excluded from the assets of the bank the stock held by it in the Federal Reserve Bank, under the provisions of Federal Reserve Act Dec. 23, 1913, c. 6, 38 Stat. 251 (U. S. Comp. St. 1916, §§ 9785–9805).

The crucial question presented is whether such exclusion is required by section 7 of the Federal Reserve Act, which in terms exempts Federal Reserve Banks, including the capital stock and surplus therein, and the income derived therefrom, from federal, state, and local taxation, except taxes upon real estate, and section 26 of that act, which repeals all provisions of law inconsistent with or superseded by any of the provisions of that act, to the extent of such inconsistency or superseding, or whether, on the other hand, the power of taxation is governed by section 5219 of the Revised Statutes of the United States (U. S. Comp. Stat. 1916, § 9784), which, as construed by the Supreme Court, expressly authorizes taxation by the states of the value of shares of national bank stock held by stockholders therein, without deduction on account of the fact that the bank's assets include securities of the United States which are declared by the statute authorizing them to be exempt from taxation by or under state authority. Act Feb. 25, 1862, 12 Stat. c. 33, pp. 345, 346; Rev. Stat. § 3701 (U. S. Comp. Stat. 1916, § 6816).

Judge Sater, who presided in the District Court, in the course of a well-reasoned opinion (First Nat. Bank of Cincinnati v. Dorr, 246 Fed. 163) reached the conclusion that section 5219 of the Revised Statutes governed, and thus that the bank's stockholders were not entitled for purposes of tax assessment, to any deduction from the value of their stockholdings on account of the bank's holding of Federal Reserve Bank stock. The bill was accordingly dismissed.

We are satisfied, not only with the correctness of this conclusion, but with the reasoning of the opinion on which the conclusion is based, and are content to affirm the judgment upon that opinion. We think it clear that Congress intended to place a national bank's holdings of Federal Reserve Bank stock upon precisely the same basis as its holdings of government bonds, so far as exemption from taxation is concerned, and thus not to extend such exemption to the taxation of shares of national bank stock held by stockholders therein.

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(257 Fed. 731)

RIETZ v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. May 13, 1919.)

No. 5212.

ARMY AND NAVY ⟹40—VIOLATION OF ESPIONAGE ACT—SUFFICIENCY OF EVIDENCE.

Evidence *held* to sustain a conviction for violation of the Espionage Act (Comp. St. 1918, § 10212c), by using language with intent to obstruct recruiting and enlistment.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Criminal prosecution by the United States against Edwin Rietz. Judgment of conviction, and defendant brings error. Affirmed.

Norman B. Bartlett and Lester T. Van Slyke, both of Aberdeen, S. D., for plaintiff in error.

Robert P. Stewart, U. S. Atty., of Deadwood, S. D. (Edmund W. Fiske, Asst. U. S. Atty., of Sioux Falls, S. D., and George Philip, Asst. U. S. Atty., of Rapid City, S. D., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The defendant was convicted upon an indictment charging him with violating the second and third clauses of section 3 of the Espionage Act (Act June 15, 1917, c. 30, tit. 1, 40 Stat. 219 [Comp. St. 1918, § 10212c]). Counts 2 and 5 charge the use of certain language for the purpose of causing disloyalty, insubordination, mutiny, and refusal of duty in the military forces, in violation of clause 2 of the section referred to; counts 3 and 6 charge the use of the same language with intent to willfully obstruct the recruiting and enlistment service, in violation of clause 3. As some of the language is offensive, we do not deem it necessary to set it out. Both the language and the circumstance under which it was used were, in our judgment, of a character to justify the court in submitting the case to the jury under counts 3 and 6 of the indictment. As the punishment was not greater than that permitted upon either count, and the sentences run concurrently, we do not express any opinion as to counts 2 and 5.

The errors relied upon have all been ruled, in decisions filed since the writ was sued out in the present case, adversely to the defendant, both by this court and the Supreme Court. Doe v. United States, 253 Fed. 903, 166 C. C. A. 3; O'Hare v. United States, 253 Fed. 539, 165 C. C. A. 208; Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566; Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561.

The judgment is affirmed.

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*Rehearing denied December 1, 1919.

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(257 Fed. 732)

TAMA MIYAKE v. UNITED STATES et al.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3268.

1. ALIENS ⟸54—DEPORTATION—DISMISSAL OF PROCEEDINGS IN TERRITORIAL COURT.

Dismissal of proceedings in the district court of Honolulu under the laws of Hawaii against a Japanese woman on the charge she was keeping a house of ill fame, resorted to for the purpose of prostitution, was not necessary to give the immigration officials the right to proceed against the woman for her deportation, and her acquittal by a jury, had she been tried, would have been no obstacle to her deportation, so that dismissal of the proceedings in the territorial court did not deprive her of her constitutional right to trial by jury.

2. ALIENS ⟸51—DEPORTATION—"ENTER."

A Japanese prostitute, a resident of Hawaii before the treaty of annexation, was not immune from deportation under the statute on any ground that she did not "enter" the United States, within its purview.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Enter.]

Appeal from the District Court of the United States for the District of Hawaii; Horace W. Vaughan, Judge.

Petition for writ of habeas corpus by Tama (or Taka) Miyake against the United States and Richard L. Halsey, Inspector in Charge of the Immigration Station of the United States for the Port of Honolulu. From an order denying the writ and dismissing the petition, petitioner appeals. Judgment affirmed.

Charles Carroll Bitting, of Honolulu, T. H., for appellant.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., and Ben F. Geis, Asst. U. S. Atty., of Willow, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellant, a Japanese alien, was ordered deported from the United States by the immigration authorities at Honolulu, Hawaii, on the ground that she was found receiving, sharing in, and deriving benefit from the earnings of a prostitute or prostitutes, and that she had been found connected with the management of a house of prostitution. On appeal to the Department of Commerce and Labor, the order of deportation was affirmed.

At the time when the deportation proceedings were begun against her, the appellant was under arrest and was about to be tried in the district court of Honolulu under the laws of Hawaii on the charge that she was keeping and maintaining a house of ill fame used or resorted to for the purpose of prostitution. Those proceedings were dismissed, and on the same day the immigration authorities proceeded against her for deportation. She filed a petition for a writ of habeas corpus in the United States District Court for Hawaii, on which an order was issued to show cause, and on the hearing on the return to the writ it

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was ordered that the writ be denied and that the petition be dismissed. From that order the appeal is taken.

[1] It is contended that by the dismissal of the proceedings in the territorial court the appellant was deprived of her constitutional right to a trial by jury. We agree with the court below that the dismissal of those proceedings was not necessary to give the immigration officials the right to proceed against the appellant as they did, and that an acquittal of the appellant by a jury, if she had been thus tried and acquitted, would have been no obstacle to the deportation proceeding. Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967.

[2] The second contention is that the appellant was not subject to deportation under the statute, since she was a resident of Hawaii before the treaty of annexation, and did not "enter" the United States within the purview of the statute. That contention was made in United States v. Kimi Yamamoto, 240 Fed. 390, 153 C. C. A. 316, and United States v. Sui Joy, 240 Fed. 392, 153 C. C. A. 318, and adversely decided by this court.

The judgment is affirmed.

(257 Fed. 733)

MILLER RUBBER CO. v. DE LASKI & THROPP CIRCULAR WOVEN TIRE CO.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1919.)

No. 3220.

1. PATENTS ⇐328—TIRE-WRAPPING MACHINE—INFRINGEMENT.
The DeLaski and Thropp patent, No. 1,011,450, relating to a tire-wrapping machine, claims 1, 2. 3, 4, 7, 8, 10, 11, 13, and 20, *held* infringed by defendant by the use of a machine purchased by, and of two machines built for, it.

2. PATENTS ⇐317—INFRINGEMENT—INJUNCTION.
Where the evidence warrants the conclusion that the infringement of patent involved in the construction and use of machines by defendant was purposeful and inexcusable, and committed under circumstances calculated to arouse just apprehension that it would be persisted in, the remedy is to be found in equity and injunction.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit in equity by the De Laski & Thropp Circular Woven Tire Company against the Miller Rubber Company. From a decree for plaintiff, defendant appeals. Affirmed.

Wm. F. Hall, of Washington, D. C., for appellant.

E. Clarkson Seward, of New York City, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This suit grew out of alleged infringement of letters patent No. 1,011,450, issued December 12, 1911, to Albert De Laski and Peter D. Thropp, assignors to the De Laski &

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Thropp Circular Woven Tire Company, plaintiff appellee. The Miller Rubber Company, defendant appellant, denies both invention and infringement. A preliminary injunction was granted, and later the cause was tried in open court upon its merits. This resulted in an opinion and decree adjudging validity of the patent as to the claims in suit (1, 2, 3, 4, 7, 8, 10, 11, 12, 13, and 20), and their infringement, and also in the present appeal.

The invention relates to a tire-wrapping machine; and in the Third Circuit the same claims of the patent as are in issue here were held valid and infringed. De Laski & Thropp Circular Woven Tire Co. v. William R. Thropp & Sons Co. (D. C.) 218 Fed. 458, affirmed upon appeal of Thropp & Sons Co. in 226 Fed. 941, 141 C. C. A. 545 (C. C. A. 3). Before the instant suit was commenced, appellant had purchased of appellee one of its make of tire-wrapping machines and is still operating it. Appellant had also purchased of the William R. Thropp & Sons Company a tire-wrapping machine which appellee claims was like the infringing device involved in the Third Circuit suit before cited; and appellant had also caused to be constructed, and it is still using, two tire-wrapping machines which appellee maintains were built in accordance with the patent in suit. The last three machines are the basis of the charge of infringement. We thus come to the question of validity of the patent in suit.

We cannot think it necessary or appropriate to discuss the question of invention. The devices alleged to be infringements in the instant case are so nearly related in form and substance to the device condemned as an infringement in the case passed on in the Third Circuit, and the opinions there rendered by the District Court and the Court of Appeals alike are so full and so well considered, as to persuade us that another opinion on the subject of validity of the patent could serve no useful purpose. The present case is "peculiarly one for the application of the doctrine of comity." Courtney v. Croxton, 239 Fed. 251, 152 C. C. A. 239 (C. C. A. 6). It is true, as regards the prior art, that appellant relies on some patents that do not appear in the opinions of the Third Circuit case. Assuming that appellant's new citations are all relevant and that the excluded Midgley patent was admissible, we are unable to find in them anything of present importance in view of the patents considered in those opinions.

The infringement depends upon whether the use of the machines which appellant admittedly operated, in addition to the one it purchased of appellee, included the pressure head or its equivalent of the patent in suit. The pressure head is composed of mechanism disposed above and below the apex of an arch frame extending upwardly from the surface of the table carrying the tire and its assembled parts during the wrapping operation. The mechanism comprises (1) a tripod suspended within the arch, having rollers mounted on its lower ends, and designed to transmit heavy pressure to the mold and the mold rings and through them to the tire, in order to prevent dislodgement and expansion of the tire in the wrapping process; and (2) appliances for exerting and releasing such pressure and consisting either of a screw engaging the top of the tripod and operated by a wheel, or of a cylinder and piston

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disposed at the top of the tripod and operated by compressed air or steam. The pressure heads in dispute here are all of this latter type.

There are several remarkable features touching the use of this pressure head. After appellant put into operation the machine it had bought of appellee, it purchased and used the Thropp & Sons Company machine; later, although it had meanwhile been notified by appellee that it was infringing the patent in suit, appellant employed another manufacturer to construct two machines substantially like the machine it had acquired of appellee, and put them into operation. We think the evidence fairly shows that the machine so acquired of Thropp & Sons Company and the machines so constructed each contained this pressure head; indeed this is scarcely open to doubt in view of two corroborating circumstances: First, that after March, 1915, possibly after the Third Circuit case was ultimately decided (August 9, 1915), Thropp & Sons Company notified appellant to remove the pressure head from the machine purchased of it, if the machine was still in use; and, second, some months before the instant suit was begun, appellant was advised by its own counsel to remove the pressure heads from the two machines it had caused to be constructed. It is not necessary to state the inferences to which this situation gives rise. However, appellant seeks in several ways to show that what happened did not amount to material infringement; and it insists that the appellee should be denied the right to maintain its present action in equity, and be remitted to an action at law.

It was sought to show, for example, that the machine obtained from Thropp & Sons Company was never used in a commercial sense; that is, it was only used for wrapping a small number of tires, and this "experimentally." The machine was purchased in May, 1913, and appellant's witnesses differ as to the length of time it was in use; its superintendent saying that it was not used after September of that year, and its assistant engineer saying that he knew it was not used after January, 1914. It seems to have been kept in the tire-wrapping room for about two years, when it is said it was "scrapped"—i. e., placed in the salvage department—the superintendent testifying:

"At the time this suit was brought the machine was in the salvage department. I cannot tell you why we did not send it back and ask the return of our money, when we found it was not satisfactory. I think that just slipped my mind; if I had thought of it earlier, I might have sent it back, don't you know. The machine cost $1,500."

Whatever else might be said of such a showing, it is inconsistent with the practically admitted length of time the machine was kept in use, and moreover, it is observable that no claim is made that the pressure head was ever removed.

The showing made as to the two machines appellant caused to be constructed is different. Admittedly they were installed and put into use in March, 1915. Appellant offered testimony to the effect that the pressure heads of the machines were removed before the instant suit was commenced (September 17, 1915); but its testimony is indefinite as to the time of removal, ranging from two weeks after the machines were placed in the tire-wrapping room, until the "summer" of 1915.

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It is enough to say of this that appellee presented testimony which in our view is convincing that the machines were regularly operated with their pressure heads until at least October, 1915—something like a month after this suit was begun.

Appellant seeks in another way, however, to meet the charge of infringement as respects the two machines so constructed for it. It insists that the valves of these machines must be presumed to have been like those of the machine it had purchased of appellee in 1911; and it offered testimony to the effect that the valves within the pressure-head mechanism of the original machine do not admit of downward pressure but only of upward pressure, claiming that they are three-way, instead of two-way, valves. This is to urge that appellee manufactured and sold to appellant a machine which was not constructed in accordance with the patent in suit; yet it is shown in appellee's opening brief, and is not contradicted, that the secretary and general manager of appellant stated, in an affidavit filed under the motion for preliminary injunction in this cause, that appellee had represented that it "was manufacturing under" the patent in suit, and that the affiant further said:

"In general construction, such machine [the one purchased of appellee] is substantially like the machine of the patent as defined by the claims in suit. * * * This machine was installed in the tire-wrapping department of" appellant "and has been used continuously since about the 1st of January, 1912, in the commercial production of automobile tires."

The patent in suit—in specification, drawings, and claims alike—clearly shows, and nothing to the contrary is suggested, that its pressure-head mechanism provides for both downward and upward pressure largely in excess of the mass weight of the tripod. It appears that many machines of appellee's make have been sold and put into operation. Appellee's expert testified that he had examined and tested some of these machines with great care, and had found that where a five-inch piston was used the pressure exerted on the tire was something like 1,700 pounds; and the pressure mechanism of the machine appellant bought of appellee has a five-inch piston. The natural inference then—indeed, the presumption—is that the pressure capacity of this machine was the same as that of the other machines produced by appellee; and any claim that appellant's particular machine was not constructed according to the patent, that it was exceptional in this regard, ought to be supported by clear and convincing testimony. There is not the slightest showing that appellee ever built or sold any other machine with this exceptional feature, and we are not satisfied that it did so in this instance.

What is shown touching the presence of three-way valves in the machine obtained from appellee is that Mr. Brucker, appellant's assistant mechanical engineer, discovered them, and was "surprised" by the discovery, just before the trial of this cause in the court below, some six years after appellant had put the machine into operation; but, upon pure hearsay, he stated that "at one time on this original Thropp machine * * * there had been such [three-way] valves with one of the ports plugged up with lead, and that the lead would blow out sometimes." It is to be inferred that this reference to "Thropp machine"

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meant the machine obtained of appellee, and it is clear that the valves alluded to were in practical effect two-way valves, since the statement is only that the "lead would blow out sometimes"; and this implies that each port so filled with lead was closed again in the same way, and also is suggestive of what a simple matter it would have been to replace the three-way valves with two-way valves. The witness illustrated his understanding of the valves by a sketch which appears in the record, and stated that "when the air was turned on * * * there was no pressure forcing this tripod down." Another witness in substance testified to the same result, though not with the particularity of the first one.

It will be observed that according to these witnesses the effect of the introduction of compressed air into the cylinder was to exert upward, but not downward, pressure. This would seem to signify that no compressed air was ever introduced into the cylinder through its upper port, and hence that compressed air was not used to cushion the action of the piston in its upward movement. Mr. Waterman, appellee's expert witness, testified:

"If plaintiff's [appellant's] machine had a three-way valve arranged as per Mr. Brucker's sketch, there would be nothing to bring this head down gradually. At the time of going up the action would be to raise the head, but there would be nothing to prevent knocking the head out when it got up. It would hit the top of the cylinder like a hammer, if it had force enough to push it up, and in coming down with the valves arranged as Mr. Brucker has shown them in his sketch there is complete equalization of pressure. Consequently there is nothing to prevent it from literally falling down. * * * Such action as here shown is entirely impracticable."

We think this interpretation of the conditions described by appellant's witnesses is manifestly right. It hardly is conceivable that such conditions could ever have existed save only for the time necessary to rectify them; and the only possible explanation of their existence, assuming that they did exist, is to be found in the hearsay testimony before pointed out. On that theory any port, the lead filling of which had been "blown out," could readily be refilled and the valve restored in effect to a two-way valve. Upon any rational view, then, of the evidence, it must result that the machine obtained of appellee was built and substantially maintained in accordance with the patent in suit. We may therefore concede the presumption claimed by appellant that the valves of the two new machines were like those of the old machine; but we must add that the clear tendency of the evidence is that the new machines were built according to the showing of the patent, and the fact already stated that appellant was advised by its own counsel to remove the heads of these machines is of itself a contradiction of its present contention that they were equipped with three-way valves. If the views thus expressed in relation to the valves of the old machine and those of the two new machines are at all correct, they are a complete answer to a claim urged by appellant that the pressure-head mechanism of the patent in suit is not necessary to the wrapping of its particular type of tire. Argument is not necessary to show the inconsistency of this claim with the years of use appellant has actually made of the old machine, not to speak of the use made of the new machines.

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[1, 2] It results that appellant's testimony fails to avoid the effect of its use alike of the Thropp & Sons Company machine and the two machines built for it; and we regard such use, particularly of the last-mentioned machines, as amounting to material infringement. This conclusion is strengthened by that of the trial judge, who saw and heard the witnesses while they were testifying. We are constrained to say, moreover, that the evidence warrants the conclusion that the infringement involved in the construction and use of the two new machines was purposeful and inexcusable, and was committed under circumstances calculated to arouse just apprehension that it would be persisted in. Whatever, then, the extent of infringement may ultimately prove to be, we agree with Judge Westenhaver that in the circumstances here shown the remedy is to be found in equity and through process of injunction. General Electric Co. v. New England Electric Mfg. Co., 128 Fed. 738, 740, 63 C. C. A. 448 (C. C. A. 2); Woodworth v. Stone, 3 Story, 749, 752, Fed. Cas. No. 18,021, opinion by Mr. Justice Story; Johnson v. Foos Mfg. Co., 141 Fed. 73, 79, 72 C. C. A. 105 (C. C. A. 6); Westinghouse Mach. Co. v. Press Pub. Co., 127 Fed. 822, 827 (C. C.).

The decree must be affirmed.

(257 Fed. 738)

NELSON v. LLOYD MFG. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 9, 1919.)

No. 3206.

1. PATENTS ⟸328—VALIDITY—TANK HEATER.
The Nelson patent, No. 836,526, for a tank heater, *held* void for anticipation and lack of invention.

2. COSTS ⟸13—DISCRETION OF COURT IN EQUITY.
Costs in equity cases are within the sound discretion of the court.

Appeal from the District Court of the United States for the Northern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by Nels M. Nelson against the Lloyd Manufacturing Company and Ira W. Rowell. Decree for defendants, and complainant appeals. Affirmed.

C. B. Gillson and Louis K. Gillson, both of Chicago, Ill., for appellant.

Arthur Wm. Nelson and Wallace R. Lane, both of Chicago, Ill., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Action for infringement of patent No. 836,526, issued to Nels M. Nelson, November 20, 1906, for a tank heater. Under stipulation the complaint of infringement was confined to claim 2. This

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claim was held invalid and the bill was dismissed for want of equity. Nelson appeals.

[1] The patented device is described in the specification thus:

"The invention relates to a heating stove adapted to be placed in tanks of water for the purpose of warming their contents and being particularly useful for warming the supply of drinking water provided for live stock."

Our consideration of the patent in suit in connection with related patents of the prior art, particularly those commented on in the opinion below, convinces us that Judge Sessions was right in concluding that the claim relied on was void for anticipation and lack of invention. We approve also the reasons upon which this conclusion was based. The opinion of the trial judge is consequently adopted and set out below.

[2] We may add that error is assigned to the overruling of a motion made by appellant under equity rule 58 to require appellee, Lloyd Manufacturing Company, to reimburse him for the expense he incurred in taking certain depositions. The object was to show that the Lloyd Company had falsely denied responsibility for the publication of a particular newspaper article. The reason for denying the motion is stated in the last paragraph of the District Judge's opinion. The recovery thus sought is at last but part of the costs accruing in the case. The rule is that costs in equity cases are within the sound discretion of the court, and we cannot say, under the facts disclosed, that denial of the motion amounted to an abuse of discretion. Du Bois v. Kirk, 158 U. S. 58, 67, 15 Sup. Ct. 729, 39 L. Ed. 895; Wagner v. Meccano Limited, 246 Fed. 603, 609, 158 C. C. A. 573 (C. C. A. 6).

The decree is affirmed.

SESSIONS, District Judge. A most careful and painstaking examination of this record, including the documentary and mechanical exhibits, compels the conclusion that Nelson has not taken even the short advance step which sometimes constitutes patentable invention and hence that his patent is invalid. The field was crowded when he entered it. The second claim of the patent is the only one here in controversy and the combination of elements therein set forth, so far as it is not a mere aggregation, was completely anticipated by devices upon which patents had been granted to others.

In his specification, Nelson thus sets forth the object of his invention:

"The invention has for its object to provide a heater of this class of simple and durable construction, efficient in operation and presenting a convenient opening for obtaining access to its interior for attending the fire or removing ashes.

"A detail of the invention provides a fire grate of improved construction for supporting a fire of wood, charcoal, or other solid fuel within the body of the heater in such a manner that it may be removed intact when it is necessary to clean the interior of the heater."

Claim 2 of the patent is in the following language:

"In a tank heater having a horizontal body section and a fire section inclined upwardly therefrom, in combination, a fire grate in basket form, means for removably securing the fire grate within the upwardly inclined fire section, and a flue leading out of the body section."

It thus appears that the essential elements of the claim are (1) a horizontal body section; (2) a fire section inclined upwardly therefrom (the two sections being combined); (3) a fire grate within the fire section; (4) means for removably securing the fire grate within the fire section; and (5) a flue leading out of the body section. The invention, if any, does not reside in the mere form of the fire grate, nor in the angle of upward inclination of

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the fire section. If these unessential matters of form be disregarded, Nelson's specification fairly described and his claim 2 literally reads upon several patented structures found in the prior art and designed and intended to accomplish the purpose and object sought by him.

Hamilton (patent No. 721,368, issued February 24, 1903) shows a structure which is aptly described by the language found in Nelson's specification: "The device takes, therefore, a U-shape, the fire for heating being in one leg of the U and the draft therefrom down through the horizontal portion and out at the other leg." Hamilton says:

"A further object is to so construct said heater that any desired fuel, such as wood or coal, may be used therewith, while the ashes may be removed therefrom without interfering with the burning of the fuel. * * * Within said tank [water tank] is placed my improved heater, which consists of a bent or elbow-shaped structure having a main body *c* [Nelson fire section] * * * and a subsidiary portion *d* [Nelson body section] connecting therewith and forming a part thereof, the two being arranged to converge, as shown, at any desired angle to each other, the converging portion extending to, at or near the bottom of the tank, while the extremities extend upwardly and project outwardly therefrom. * * * The part *c* (fire section) is provided with a hinged cover *e*, having suitable perforations *f* therein to provide a draft for said heater, while upon the outer end of the part *d* [body section] is placed a removable cover *g*. * * * Connecting with the part *d* [body section] and extending vertically therefrom is a smoke pipe *h* [Nelson flue] which may be of any desired length. * * * In Fig. 3, I have shown a construction adapted for burning coal. Within the part *c* [fire section], near the bottom and preferably above the part *d* [body section], I attach a support or ledge *i* [Nelson means for removably securing the fire grate within the upwardly inclined fire section] upon which is placed a removable grate *j* [Nelson fire grate, necessarily with openings to form down shaft]."

A more complete anticipation of Nelson's device, in form, construction, purpose and claimed combination of elements could scarcely be conceived.

Just (patent No. 395,980, issued January 8, 1889) shows a structure comparable, in all essential respects, with that of Nelson. In his specification Just says: "When it is desired to heat water in shallow troughs [an advantage specially urged by plaintiff] we prefer to construct the apparatus as shown in Fig. 4 of the drawings, wherein is represented a horizontal cylindrical body portion, *A* [body section], from one end of which projects an upwardly and outwardly inclined similarly made feeding end portion, *B* [fire section]. To the upper side of the body portion *A*, at the opposite end thereof, is applied the smokestack *H* [flue]."

The specification calls for a removable grate supported upon suitable legs within the fire pot or heater, and also for a removable cover, with damper opening therein, for the fire pot or heater. Just does not definitely locate his fire grate within and across the upwardly inclined section of his heater illustrated in Fig. 4 of the drawings, but impliedly he does so locate the grate, because the fire heater section is the one provided with a cover and damper opening. At any rate, to so locate the fire grate would not constitute invention.

In Wedean (patent No. 713,821, issued November 18, 1902) a heater is shown which is substantially like that of Nelson in all respects, except that the fire section is vertical instead of inclined and the down draft is through the sides instead of the bottom of the fire basket. The operation of the Wedean heater is identical with that of the Nelson structure. No patentable difference exists.

The heater illustrated and described in Cardarelli patent, No. 506,810, issued October 17, 1893, closely approaches Nelson's device, but differs therefrom in that the fire grate does not extend entirely across the fire section and the fire section is not provided with a cover. It may well be doubted that a modification of the Cardarelli structure in these respects would constitute patentable invention.

None of the patents above mentioned, except the one to Hamilton, was cited upon Nelson in the Patent Office proceedings. This fact greatly weakens the presumption ordinarily arising from the issuance of a patent.

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If claim 2 of the Nelson patent could be sustained, no debatable doubt would exist as to defendants' infringement. Their heater is none the less sectional because the sections thereof are connected by permanent welding instead of detachable joints.

Defendants' counterclaim is not of such character that it can be litigated in a suit in equity and the damages, if any, determined in an accounting.

Plaintiff's motion for costs upon the taking of depositions will be denied. If interrogatory No. 16 be so narrowed as to distinguish it from interrogatory No. 20, objection to which was sustained, the answer to the former, while unsatisfactory, was not so evasive as to call for the imposition of a penalty.

A decree will be entered, dismissing plaintiff's bill of complaint, with costs to the defendants to be taxed.

(257 Fed. 741)

BERGER MFG. CO. v TRUSSED CONCRETE STEEL CO.

(Circuit Court of Appeals, Sixth Circuit. October 10, 1918.)

No. 3057.

PATENTS ⇐328—VALIDITY—STUDDING AND METAL LATH COMBINATION.

The Caldwell patent, No. 682,316, for a studding and metal lath combination, *held* invalid, as involving elements developed in the prior art.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Suit in equity for the infringement of a patent by the Berger Manufacturing Company against the Trussed Concrete Steel Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Harry Frease, of Canton, Ohio, for appellant.

W. F. Guthrie, of Youngstown, Ohio, for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and WALTER EVANS, District Judge.

PER CURIAM. The District Court held invalid, for lack of invention, the patent issued September 10, 1901, to Caldwell, for a studding and metal lath combination, No. 682,316, and dismissed the bill which the Berger Company, the owner of the patent, had brought against the defendant. Plaintiff appeals.

The patented structure is sufficiently indicated by the claim in suit:

"A building construction comprising perforate metallic lathing and a stud of malleable metal with flat prongs formed thereon and therefrom by making perforations in the flat portion of the metal strip so that the prongs are supported at one end and have metal on each side of them, projecting through perforations in the lathing and bent over the latter so as to clench same."

It must be conceded that the complete combination specified in the claim is not precisely anticipated, that it possessed commercial utility, that it has gone into considerable use, and—more important than all—that metallic studs or supports and metal lath had been used in combination for a number of years and fastened together in different ways without adoption by any one of the specific methods of fastening here disclosed. These considerations make strongly in favor of patentabil-

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ity; but we are compelled to think that they are not sufficient to overcome the conclusions necessarily resulting from the state of the art.

It is clear that sheet metal supports in the form of studding or furring had been used to carry perforate metal lathing long before Caldwell's alleged invention. The two had been fastened together by separate wire fastenings and by several other different methods. It is clear, also, from the record that it was a common expedient to attach things to be carried by sheet metal support to that support by cutting out and striking up a prong from the support and then bending it back over the part carried. The record shows that this expedient had been used under a great variety of conditions. One of the older instances of such use of this attachment was to make the fastening between a tubular sheet metal fence post and the supported fence wire. To use this same method of fastening to carry one or two strands of a metal lathing, instead of to carry one fence wire, we think cannot be considered to involve invention. It is as if common wooden lath had always been attached to wooden studding by screws, and some one observed that to nail them on as fence boards are nailed to a fence post made a quicker and better method of fastening. The fact that Caldwell used a support with a flat surface, and thereby got a little better binding effect on both sides of his prong than when the surface was round cannot turn the scale in favor of the patentee's contention.

The principles involved and the controlling conditions are so familiar and their application is so wholly a matter of judgment that it seems unnecessary to go into the question more fully.

The decree is affirmed.

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(257 Fed. 881)

HAYES WHEEL CO. v. AMERICAN DISTRIBUTING CO.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1919.)

No. 3252.

1. COMMERCE ⟸69—INTERSTATE COMMERCE—INTERFERENCE BY STATE—CORPORATIONS.

Pub. Acts Mich. 1907, No. 310, declaring that no foreign corporation shall be capable of making a contract within the state until compliance with provisions of the act, does not impose or attempt to impose a tax on all the capital of a foreign corporation, whether employed in state or interstate commerce, or to tax property permanently without the state, or to impose a fee upon its business done in the state, without distinction between state and interstate, and is not otherwise invalid.

2. CORPORATIONS ⟸661(2)—FOREIGN CORPORATIONS—RIGHT TO SUE.

Plaintiff, a foreign corporation, *held* to have a substantial local and domestic business entirely separate from, and not merely incidental to, its interstate business, so that it could not, where it had not complied with Pub. Acts Mich. 1907, No. 310, maintain suit for unpaid commissions, as well as anticipatory damages on account of cancellation of contract for sale on commission "for the entire United States" of automobile wheels manufactured by defendant, a Michigan corporation, in view of Comp. Laws Mich. 1897, § 10467.

3. TRIAL ⟸141—QUESTIONS OF LAW OR FACT.

Whether plaintiff, a foreign corporation, was doing business in Michigan, so as to be subject to the taxing laws of Michigan, *held* one of law; the evidence not being conflicting.

4. COURTS ⟸95(2), 366(7)—DECISION OF STATE SUPREME COURT—FOLLOWING BY FEDERAL COURT.

The Supreme Court of Michigan having construed Pub. Acts Mich. 1907, No. 310, as making unenforceable a contract made by a foreign corporation before compliance with the act, notwithstanding compliance had while contract is still in force, the declaration of invalidity must be recognized by courts, state or federal, wherever suit may be brought for enforcement of contract.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Assumpsit by the American Distributing Company against the Hayes Wheel Company. Verdict and judgment for plaintiff, motion for judgment notwithstanding verdict denied (250 Fed. 109), and defendant brings error. Reversed, with directions.

Justin R. Whiting, of Detroit, Mich., and Richard Price, of Jackson, Mich., for plaintiff in error.

Thomas E. Barkworth, of Jackson, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On July 1, 1910, the American Distributing Company, an Ohio corporation, having its office and principal place of business at Jackson, Mich., contracted in writing at that place, for the sale on commission "for the entire United States," for a term of five years, of automobile wheels manufactured by the Hayes Wheel Company, a Michigan corporation, engaged at Jackson,

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Mich., in the manufacture of such wheels. The Distributing Company's business was that of selling agents for manufacturers of automobile parts. At the time this contract was made the Michigan statute (P. A. Mich. 1907, Act No. 310) declared it unlawful for any foreign corporation to carry on business in Michigan until it should procure from the secretary of state a certificate of authority for that purpose, to obtain which it was required to make a sworn statement showing, among other things, the location of its principal office and principal place or places of business generally, as well as specifically, in Michigan, the total value of the property owned and used by it in its business and the value of the property owned and used in Michigan, the total amount of business transacted during the preceding year, and the amount, if any, transacted in Michigan, and "such other facts bearing on the matter as the secretary of state may require." The corporation was required to pay to the secretary of state a franchise fee (subject to a minimum of $25) of one-twentieth of 1 per cent. of "its authorized capital stock represented by the property owned and used and business transacted in Michigan," as determined by the secretary of state. Until compliance with the act, foreign corporations subject to it were declared incapable of making valid contracts in Michigan. Section 8 expressly provided that the act should not be construed "to prohibit any sale of goods or merchandise which would be protected by the rights of interstate commerce." The Distributing Company had made no attempt to comply with this statute, although it had been doing the same kind of business at Jackson, Mich., for about 18 months before the contract in question was made; nor did it make any attempt to so comply until more than 3 years after the contract was made.

On May 25, 1914, the Wheel Company canceled the contract, and thereupon the Distributing Company brought this suit to recover certain unpaid commissions already earned under the contract, as well as anticipatory damages on account of its cancellation. By another statute then in force (Comp. Laws Mich. 1897, § 10467) a foreign corporation, subject to the act and not complying with it, was in effect denied right of action upon contracts resulting therefrom. Flint v. Le Heup, 199 Mich. 41, 47, 48, 165 N. W. 626, and cases cited. There was trial by jury. Against defendant's objection that plaintiff could not recover, because of failure to comply with this statute, the latter recovered verdict and judgment; the trial court holding as matter of law that the contract related essentially to interstate commerce and so was not affected by the Michigan statute. See opinion on motion for new trial, 250 Fed. 109. The correctness or incorrectness of this conclusion is the only question presented.

The general limitations upon state control of commerce are well defined. It is fundamental that interstate commerce is within the protection of the federal Constitution, and that a state has no power by taxation to impose a burden upon it. Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150; Rosenberger v. Pacific Express Co., 241 U. S. 48, 36 Sup. Ct. 510, 60 L. Ed. 880. And if, as plaintiff

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contends, the effect of the Michigan statute is to impose a tax upon every foreign corporation which does business in the state, even though engaged wholly in interstate commerce, it is bad. McCall v. California, 136 U. S. 104, 109, 10 Sup. Ct. 881, 34 L. Ed. 392; N. & W. Ry. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394. And so, in other words, if the state has required plaintiff, as a condition of doing business in Michigan, to surrender its constitutional right to transact commerce between the states. So. Pacific Co. v. Denton, 146 U. S. 202, 207, 13 Sup. Ct. 44, 36 L. Ed. 942. Applying these principles concretely, the statute is bad if it attempts to impose a tax upon all plaintiff's capital, whether employed in state or interstate commerce (Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; Western Union Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Butler Bros. Co. v. U. S. Rubber Co. [C. C. A. 8] 156 Fed. 1, 17, 84 C. C. A. 167); or if it attempts directly or indirectly to tax property permanently without the state (Louisville, etc., Co. v. Kentucky, 188 U. S. 385, 396, 23 Sup. Ct. 463, 47 L. Ed. 513); or if it assumes to impose a license or franchise fee upon business done in the state without distinction between state and interstate business (Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649).

On the other hand, the authority of the state to restrict the right of plaintiff corporation to engage in business within its limits, or to sue in its courts, so long as interstate commerce is not thereby burdened, is well settled (Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 83, 34 Sup. Ct. 15, 58 L. Ed. 127; Interstate Amusement Co. v. Albert, 239 U. S. 560, 568, 36 Sup. Ct. 168, 60 L. Ed. 439); and the mere fact that plaintiff is engaged in interstate commerce does not exempt its property from state taxation (White Co. v. Massachusetts, 231 U. S. 68, 82, 83, 34 Sup. Ct. 15, 58 L. Ed. 127; Baltic Mining Co. v. Massachusetts, supra); and if the state tax affects merely the proportion of plaintiff's property in the state devoted to state business, or the domestic business done within the state, and the state business is thus capable of separation from the interstate, the latter is thus not directly or indirectly burdened, and the tax is good (Western Union Co. v. Massachusetts, 125 U. S. 530, 552, 8 Sup. Ct. 961, 31 L. Ed. 790; Ratterman v. Western Union Co., 127 U. S. 411, 424, 8 Sup. Ct. 1127, 32 L. Ed. 229; Pullman Co. v. Adams, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877; Allen v. Pullman Co., 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134). If not so capable of separation, it would be bad. "The substance, and not the shadow, determines the validity of the exercise of the power." International Paper Co. v. Massachusetts, 246 U. S. at page 144, 38 Sup. Ct. at page 295, 62 L. Ed. 624, Ann. Cas. 1918C, 617.

[1] Does the Michigan statute impose or attempt to impose a tax upon all the capital of a foreign corporation whether employed in state or interstate commerce, or to tax property permanently without the state, or to impose a fee upon its business done in the state, without distinction between state and interstate? It seems to us clear that it neither does nor attempts to do either of these things. The language of the statute indicates, in our opinion, an intention to assess the

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franchise fee only upon domestic business, which is assumed to be capable of separation from interstate business. The tax is in terms limited to a percentage of "the proportion of its authorized capital stock represented by the property owned and used and business transacted in Michigan, determined as above provided." The secretary of state is to determine this proportion, not arbitrarily, as plaintiff charges, but "from the papers so filed and the facts so reported [by the corporation] and any other facts coming to his knowledge bearing upon the question." Nor is the corporation without remedy against unrestrained or mistaken determination of what such proportion amounts to, neither is it subject to the employment of secret or private information in reaching such determination. It is not only expressly given "the right, on application, to be heard by the secretary of state touching the matter of the determination of the proportion of its capital stock represented by property used and business done in Michigan," but, if dissatisfied with the result, it is in terms given the right of appeal to a "board of appeal consisting of the auditor general, state treasurer and attorney general." Due provision is thus, in our opinion, made for separating state from interstate business. The fact that the statute declares final the decision of this board of appeal does not effect a denial of due process. The right of appeal from the decision of an administrative board in assessing taxes and valuing property is not necessary. "One hearing is sufficient to constitute due process." Mich. Central R. R. Co. v. Powers, 201 U. S. at pages 301, 302, 26 Sup. Ct. at page 466, 50 L. Ed. 744. "A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles." [1] Under the Michigan system of taxation generally, while a valuation by a reviewing board is final in the absence of fraud, yet a remedy in some form is always open against fraudulent or arbitrary conduct. We are cited to no authorities, and we have found none, opposed to the conclusion that a tax measurement such as the statute in question provides does not burden interstate commerce. It cannot well be claimed that the minimum fee of $25 is unreasonable, or that it burdens interstate commerce.

The remaining provisions of the act strengthen rather than weaken the inference naturally deducible from the assessment provisions we have discussed, viz. that the act was not intended to impose a tax upon interstate business. The declaration that it shall be unlawful for any foreign corporation to carry on its business in this state until it has procured certificate of authority must be considered in connection, not only with the assessment provisions already cited, but with the declaration of section 8, that the act shall not be construed "to prohibit any sale of goods or merchandise which would be protected by the rights of interstate commerce." So considered (whatever might be the effect of the quoted words standing alone), the natural meaning of the words "its business" would be "its domestic [state] business." But we are not left to our own interpretation of the statute, for the Supreme Court of Michigan has expressly or by necessary implication repeatedly construed the act of 1907 and other statutes of like nature

[1] Per Justice Cooley, in Weimer v. Bunbury, 30 Mich. 214, 215.

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as not imposing a tax upon interstate business.[2] The Michigan statute of 1891 (No. 182), as amended by Pub. Acts 1893, No. 79, which in terms required every foreign corporation "which shall hereafter be permitted to transact business in this state" to pay a franchise fee, and provided that all contracts made in the state "by any corporation which has not first complied with the provisions of this act shall be wholly void," was construed by the Supreme Court of the state as not applicable "to foreign corporations whose business within this state consists merely of selling, through itinerant agents, and delivering commodities manufactured outside of this state." Coit v. Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819. The Michigan act of June 20, 1889 (3 Howell's Ann. Stat. § 4161d6) which declared the terms on which manufacturing and mercantile companies generally, both foreign and domestic, might carry on business in that state, was construed in People v. Hawkins, 106 Mich. 479, 483, 64 N. W. 736, 738, as not "aimed at the exclusion of foreign companies, or the imposition of conditions upon their doing business, unless they desire the benefits to be derived from the law applicable to domestic corporations." The construction of both of these acts by the Michigan Supreme Court was adopted by this court in Oakland Co. v. Wolf Co., 118 Fed. 239, 243, 55 C. C. A. 93. And see Coit v. Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819.

In Fifth Avenue Society v. Hastie, supra, section 6 of the act of 1901 (No. 206), which is in the identical language of section 8 of the act of 1907, is referred to as declaring that the provisions of this act shall not be applicable to the sale of goods or merchandise which would be protected by the rights of interstate commerce. In Imperial Curtain Co. v. Jacob, supra, 163 Mich. 76, 127 N. W. 774 (also under the act of 1901), it is said: "If the plaintiff did any business of a local character, the case is not within the terms of the statute." In Standard Fashion Co. v. Cummings, supra, the foreign corporation involved was held not to be doing business in Michigan. The act of 1901 (No. 206) and the amendments of 1903 (No. 34), 1911 (No. 266), and 1913 (No. 277), differ, we think, from the act of 1907 (No. 310) in no respect material to the decision of this case. The construction put by the Supreme Court of Michigan on the meaning of the statute is binding upon us, although its determination of the necessary effect of the statute is not conclusive. Crew v. Pennsylvania, 245 U. S. 292, 294, 38 Sup. Ct. 126, 62 L. Ed. 295; Standard Oil Co. v. Graves, 249

[2] Despres v. Zierleyn, 163 Mich. 390, 128 N. W. 769; Nernst Lamp Co. v. Conrad, 165 Mich. 604, 609, 131 N. W. 120; Lange Co. v. Brace, 186 Mich. 453, 459, 152 N. W. 1026 (all of these cases involve the statute of 1907); Fifth Avenue Society v. Hastie, 155 Mich. 56, 118 N. W. 727; Imperial Curtain Co. v. Jacob, 163 Mich. 72, 127 N. W. 772 (both of which cases were under the previous act of 1901); Haughton Elevator Co. v. Candy Co., 156 Mich. 25, 120 N. W. 18; Standard Fashion Co. v. Cummings, 187 Mich. 196, 153 N. W. 814, L. R. A. 1915F, 329, Ann. Cas. 1916E. 413 (the last two cases arising under the act of 1903); Power Specialty Co. v. Michigan Power Co., 190 Mich. 699, 157 N. W. 408 (arising under the amendment of 1911); Sturtevant Co. v. Leitelt, 196 Mich. 552, 163 N. W. 13 (arising under the amendment of 1913).

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U. S. 389, 39 Sup. Ct. 320, 63 L. Ed. 662, decided by the Supreme Court April 14, 1919.

The cases specially relied upon by plaintiff are, in our opinion, clearly distinguishable from the instant case. In Crutcher v. Kentucky, supra, the statute was construed as requiring the foreign express company to obtain a license from the state preliminary to doing interstate business. The statute involved in Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, and Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, attempted to tax the entire capital stock of the foreign corporation as condition of doing business within the state. The law involved in International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, exacted a tax by way of a percentage upon the entire capital stock of the foreign corporation, and, as construed by the Kansas courts, was intended to apply even where the business of the foreign corporation was purely interstate. It also required, as a condition of doing business, a statement setting forth certain facts as to the amount of capital stock, its value, etc., and forbade the maintaining of action by the corporation unless certificate of such filing had been obtained. The requirement of this statement was held a burden on interstate commerce. In Looney v. Crane, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230, the taxes in question seem to have been assessed with reference to the entire authorized capital stock. The case was aggravated by large increases in rates, etc., after the foreign corporation had established its agency. In Crew v. Pennsylvania, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. Ed. 295, the tax held bad was measured by a percentage of the entire business transacted, although the foreign sales were about 86 per cent. of the gross sales. In International Paper Co. v. Massachusetts, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617, there was involved a percentage tax computed on the entire authorized capital. The case was distinguished from the Baltic Mining Co. Case, supra, in the fact that since the decision in the latter case was rendered the Legislature had removed the previously existing $2,000 maximum limitation, thus making it in essential and practical operation like Western Union Co. v. Kansas and Pullman Co. v. Kansas, supra. The other cases relied upon by plaintiff seem to require no special mention.

On the other hand, in Western Union Co. v. Massachusetts, supra, a tax on account of property owned and used by the corporation in that state, whose value was ascertained by comparing the length of its lines in that state with the length of its entire lines, was held good. In Ratterman v. Western Union Co., supra, a tax assessed under the laws of Ohio upon receipts of the telegraph company, derived partly from interstate and partly from state commerce and capable of separation, but returned in gross, was held invalid in proportion to the extent that the receipts were derived from interstate commerce, but otherwise valid. In Pullman Co. v. Adams, supra, a tax imposed by the laws of Mississippi on sleeping and palace car companies, based on mileage of railroad track in the state over which the cars were run, plus a specific charge of $100, was sustained. In Allen v. Pullman Co.,

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supra, a statute of Tennessee assessing a tax of $3,000 per annum, in lieu of all other except ad valorem taxes, on account of passengers whose transportation began and ended within the state, not referring to or affecting the interstate business of the companies, was sustained. In Kansas City Railway v. Kansas, 240 U. S. 227, 232, 36 Sup. Ct. 261, 60 L. Ed. 617, a tax on the privilege of being a corporation, graduated according to paid-up capital, with a reasonable maximum assessed against a domestic corporation engaged in both state and interstate commerce, was held not improper under the due process clause of the Constitution. In Baltic Mining Co. v. Massachusetts, supra, and White Co. v. Massachusetts, supra, an excise tax measured by the authorized capital of the corporation, but limited to a specified sum, was held not an unconstitutional burden on interstate commerce, and not to violate the due process or equal protection clauses of the Constitution. We conclude that a foreign corporation, doing a wholly interstate business, was not required to make declaration or procure certificate of authority. It results that, in our opinion, the Michigan statute in question does not impose a burden upon interstate commerce, nor is it otherwise invalid.

[2] We are thus brought to the ultimately controlling question whether, as plaintiff urgently insists is the case, its business was solely interstate commerce, the local business being merely incidental thereto, or whether, on the other hand, plaintiff was engaged locally in both state and interstate commerce. In the former case it would not be subject to the tax; in the latter, it would be.

Plaintiff's business embraced sales largely by way of orders taken by traveling solicitors from automobile manufacturers in several states lying generally, if not universally, north of the Ohio and east of the Mississippi rivers. Plaintiff seems to have had no office, at least for commercial business, anywhere except at Jackson, Mich. There its books and records of commercial transactions were kept; there a majority at least of its officers resided, and at or from that point all of its business seems to have been directed and conducted, excepting so far as concerns actual solicitation of orders by traveling salesmen. The business of at least one of these salesmen was confined to Michigan. Plaintiff was acting under similar contracts as sales agent for several manufacturers of automobile parts, other than defendant. So far as the record shows, all its tangible property was in Michigan. That state was and is the most prominent of the automobile manufacturing states.

During the five-year contract period plaintiff's sales in Michigan amounted to 61.2 per cent. of its total sales, and for the last 1½ years of that period the Michigan sales were about 75 or 80 per cent. of the aggregate business. While the proportion of Michigan business increased during the contract period, and the proportion when the contract was made does not definitely appear, the natural inference from the record and the arguments would be, we think, that the Michigan sales were from the first approximately at least one-half of the total sales. Plaintiff's declaration, made September 29, 1913, for authority to do business in Michigan, gave the location of its principal office

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and of its principal place of business as Jackson, Mich., and two of its three officers as residing there, and the third as living at Detroit, Mich. Its authorized capital stock was reported at $4,000 [under the statute in question the tax would have been $25]; the total value of its property owned and used in its business as $23,538.98, all of which, with the exception of furniture and fixtures, represented cash and accounts and bills receivable. The value of the property owned and used in Michigan was given as "furniture and fixtures $294.96," the total amount of business transacted during the preceding year was stated (in the sixth item) to be $42,893.96, and the amount transacted in Michigan as "all, as specified in sixth item."

It is difficult, if not impossible, to distinguish plaintiff's business in principle from that of the ordinary domestic mercantile corporation selling at wholesale, both in the state of its creation and business location as well as in other states. Assuming, as we do, for the purposes at least of this opinion, that plaintiff's business, so far as it related to business outside of Michigan, was in interstate commerce, it yet seems plain to us, not only that, independently of the question whether plaintiff's business was local or interstate, it was doing business in Michigan, and so within the statute of that state if it was doing a substantial Michigan business (International Text-Book Co. v. Pigg, supra, 217 U. S. at pages 104, 105, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. [N. S.] 493, 18 Ann. Cas. 1103), but also that it was in fact doing a substantial local business in Michigan within the meaning of the law of interstate commerce. We think it a misnomer to characterize its business as essentially interstate. In our opinion it had a substantial local and domestic business, entirely separate from, and not merely incidental to, its interstate business. Baltic Mining Co. v. Massachusetts, supra, at page 86, 34 Sup. Ct. 15, 58 L. Ed. 127; Nernst Lamp Co. v. Conrad, supra; Lange v. Brace, supra, at page 462, 152 N. W. 1026; American, etc., Co. v. Griswold, 143 App Div. 807, 128 N. Y. Supp. 206, affirmed 206 N. Y. 723, 100 N. E. 1124; Flint v. Le Heup, supra, at page 47, 165 N. W. 626; Loomis v. Construction Co. (C. C. A. 6) 211 Fed. 453, 456, 128 C. C. A. 125, and cases cited.

Comparison with the leading cases relied on by plaintiff serves to emphasize the substantial and, we think, the dominant nature of this local and domestic business. For example, in Crutcher v. Kentucky, supra, the principal office was in New York, the state of its creation, only its local office was in Kentucky, and the Kentucky business was presumably but a few per cent. at the most of the company's total business. In Western Union v. Kansas, supra, and Pullman v. Kansas, supra, a similar situation presumably existed. In International Text-Book Co. v. Pigg, supra, the Book Company did its manufacturing and exercised its corporate franchises generally in the state of its incorporation, and had no office of its own within the state of Kansas. In International Paper Co. v. Massachusetts, supra, the corporation's home office was in the state of its creation, where its sales were passed on; and in Massachusetts, whose tax was in question, but one of its 23 mills was located. In Looney v. Crane, the corpora-

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tion's home office and principal place of business, where its manufacturing and dealings generally were carried on, was in the state of its creation. The Texas agency was a supply depot for carrying on interstate commerce, and to it goods were shipped from the principal place of business and from it shipments were made to customers within and without Texas. The situation in Crew v. Pennsylvania has already been stated.

[3] In each of these cases the business done at the office in the state of the corporation's creation was the dominant business. In the instant case, even if the business done by plaintiff in the foreign state (Michigan) was not its dominant business, it clearly was a substantial and separable part of it. The mere fact that it involved interstate business did not impress the local and domestic business with that character. Williams v. Fears, 179 U. S. 270, 276, 21 Sup. Ct. 128, 45 L. Ed. 186; Interstate Amusement Co. v. Albert, 239 U. S. 560, 565, 36 Sup. Ct. 168, 60 L. Ed. 439. While the question whether the plaintiff was "doing business in Michigan," so as to subject it to the tax law of that state, would be one of fact, if the evidence were in conflict (Oakland Co. v. Wolf Co., supra), we think that, upon this record, the question is one of law.

[4] These views compel a reversal of the judgment below, unless plaintiff's compliance with the statute in 1913 made the contract enforceable after that date. Section 6 of the statute of 1907 declares that—

"No foreign corporation, subject to the provisions of this act, shall be capable of making a valid contract in this state until it shall have fully complied with the requirements of this act. * * *"

The Supreme Court of Michigan has construed the statute as making unenforceable a contract made before compliance with the statute, notwithstanding compliance was had while the contract was yet in force. Showen v. Owens, 158 Mich. 321, 332, 122 N. W. 640, 133 Am. St. Rep. 376; Despres v. Zierleyn, 163 Mich. 399, 403, 404, 406, 407, 128 N. W. 769; Nernst v. Conrad, 165 Mich. 604, 605, 609, 131 N. W. 120. And see Flint v. Le Heup, 199 Mich. 41, 47, 48, 165 N. W. 626; Hastings Industrial Co. v. Moran, 143 Mich. 679, 107 N. W. 706. This declaration of invalidity must be recognized by the courts, state or federal, in whatever state suit may be brought for its enforcement. Loomis v. People's Construction Co. (C. C. A. 6) 211 Fed. 453, 457, 458, 128 C. C. A. 125, and cases there cited. As the case must be tried again, we neither express nor intimate an opinion on the question whether plaintiff is entitled to recover on a quantum meruit or otherwise, on account of commissions earned before the cancellation, or whether (a question not suggested by counsel) the dealings between the parties have been such, since plaintiff's compliance with the Michigan statute, as to work, in equity or otherwise, a ratification by or estoppel against defendant, as concerns the contract in suit. See Turner v. Construction Co. (C. C. A. 5) 229 Fed. 702, 144 C. C. A. 112; Montgomery Traction Co. v. Montgomery Light, etc., Co. (C. C. A. 5) 229 Fed. 672, 144 C. C. A. 82. Neither of these

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questions has been argued by counsel or apparently considered by the District Judge.

The judgment of the District Court is reversed with directions to award a new trial.

(257 Fed. 890)

EMPIRE FUEL CO. v. LYONS.

LYONS v. EMPIRE FUEL CO.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1919.)

Nos. 3243, 3255.

1. COURTS ⟸274—FEDERAL COURT—PROCESS—CORPORATIONS.
Service in the federal district of Ohio on a West Virginia corporation will give the District Court for Ohio jurisdiction, if such corporation was doing business in Ohio in such a manner and to such extent as to warrant an inference that through its agents it was present there.

2. CORPORATIONS ⟸642(4½)—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE.
The fact that the general manager of a West Virginia corporation, who resided in Ohio and maintained an office there as managing agent of another corporation, maintained a file for the West Virginia company, so as to carry on from his Ohio office correspondence necessary between himself and the West Virginia corporation, does not show that such corporation was doing business in Ohio.

3. CORPORATIONS ⟸642(6)—DOING BUSINESS IN STATE.
A sporadic or occasional sale in Ohio of coal, made by a West Virginia company, whose mines were in the latter state, does not constitute doing business in Ohio.

4. CORPORATIONS ⟸673—DOING BUSINESS IN STATE—EVIDENCE.
Where a West Virginia mining company, the capacity of whose mines was about 600 tons per day, contracted for the transportation of a large part of its product by boat into Ohio, and thence by rail to a city therein, such contract was important on the question of whether the West Virginia company was doing business in Ohio.

5. CORPORATIONS ⟸642(6)—DOING BUSINESS IN STATE.
Doing business within the state does not necessarily require that it be done persistently and continuously, in order to justify service of process on an agent of a foreign corporation which does business within the state.

6. COURTS ⟸274—FEDERAL COURT—DISTRICT OF SUIT—DOING BUSINESS IN STATE.
In an action against a West Virginia corporation, begun by service of process out of the federal District Court for Ohio upon its agent found within that state, *held*, that the West Virginia corporation was doing business within the state of Ohio, so as to be subject to the jurisdiction of the federal court.

7. CONTRACTS ⟸176(1)—CONSTRUCTION—UNAMBIGUOUS CONTRACT.
The construction of an unambiguous contract is for the court, notwithstanding the construction involves consideration of attendant conditions and circumstances not in dispute.

8. SHIPPING ⟸108—SPECIAL CONTRACT FOR TRANSPORTATION—CONSTRUCTION—JURY QUESTION.
In an action against a West Virginia mining company for breach of a contract under which plaintiff was to transport by boat coal from the mine in West Virginia to a point in Ohio, whence it would be reshipped by rail, the question whether the contract required defendant to furnish coal

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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for water shipment, regardless of whether it could obtain cars at its mine, *held*, under the evidence, for the jury.

9. APPEAL AND ERROR ⇐859—REVIEW—EVIDENCE.
On writ of error, the Circuit Court of Appeals cannot weigh the evidence or determine a question of fact.

10. SHIPPING ⇐108—CONTRACT FOR TRANSPORTATION—CONSTRUCTION—EVIDENCE.
In an action by the plaintiff for breach of contract, which he asserted obligated the defendant mining company to furnish him 350 tons of coal per day for transportation by water, evidence *held* sufficient to support a finding by the jury that such was the parties' intention.

11. APPEAL AND ERROR ⇐518(4)—REVIEW—RECORD.
Where it did not affirmatively appear from the record that plaintiff asked leave to amend an affidavit for attachment, a claim on writ of error that the dismissal of the attachment was improper, and that plaintiff should have been allowed to amend, cannot be considered.

12. APPEAL AND ERROR ⇐1151(3)—DETERMINATION—MODIFICATION OF JUDGMENT—RECORD.
Where the record did not show that defendant's liability for an item was conceded, and that there was no room for contesting it, a modification of the judgment cannot be directed, so as to include such item, even though it was improperly excluded on the ground that it was a matter cognizable only in a court of admiralty.

13. APPEAL AND ERROR ⇐1178(6)—DETERMINATION—REMAND.
A judgment may be remanded for trial upon a particular branch of the question, such as damages, or an issue relating to jurisdiction, without the judgment being reversed in toto.

14. APPEAL AND ERROR ⇐1178(6)—DETERMINATION—REMAND.
Where the amount of damages recovered was not palpably right or plainly insufficient, plaintiff cannot be awarded a new trial on the issue of damages, as he desired to retain the recovery already had.

In Error to the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Action by John E. Lyons against the Empire Fuel Company. There was a judgment for plaintiff, and defendant brings error, and plaintiff also brings error, asserting that the award of damages was insufficient. Affirmed on both writs.

Murray Seasongood, of Cincinnati, Ohio, for plaintiff.

Frank E. Wood, of Cincinnati, Ohio, and M. G. Sperry, of Clarksburg, W. Va., for defendant.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error in No. 3243 is a West Virginia coal-mining corporation. Having a contract for shipping coal to Toledo, Ohio (as stated in the brief of its counsel), it made with defendant in error, on April 28, 1917, a written contract for the transportation of coal from May 15, 1917, to May 15, 1918, by river barges, from Hugheston, W. Va., which is on the Kanawha river, to Pomeroy, Ohio, which is on the Ohio river, and for the loading of such coal into "such cars as may be furnished at Pomeroy, Ohio." On August 15, 1917, defendant in error, hereafter styled plaintiff, brought this suit in a state court of Ohio for damages for

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alleged breach of the transportation contract, attaching certain barges of coal. Summons was served August 23, 1917, at Cincinnati, Ohio, on B. Lee Hutchinson, who was general manager of the fuel company, hereafter called defendant. The suit was removed to the court below. Defendant there moved to quash the service of summons on the substantial ground that defendant was not doing business in Ohio and so was not subject to suit therein. After hearing, both on affidavits and oral testimony, the District Judge overruled the motion to set aside the service, holding that defendant was doing business in Ohio. Under issue joined on the merits, plaintiff recovered verdict and judgment.

[1-6] 1. *Jurisdiction.* The effectiveness of the service of summons, and thus the jurisdiction of the court below, depends upon whether defendant was doing business in Ohio, "in such a manner and to such an extent as to warrant an inference that through its agents it was present there." Green v. Chicago, B. & Q. Ry. Co., 205 U. S. 530, 532, 27 Sup. Ct. 595, 596 (51 L. Ed. 916). If defendant was doing business in Ohio, service on Hutchinson gave jurisdiction. Defendant had acquired no permission under the statutes of Ohio to do business in that state. Its main office was at Fairmount, W. Va.; its mining office at Hugheston, in that state. Mr. Hutchinson, its general manager in charge of operations, spent about one-half his time at Hugheston, the remainder at Cincinnati, where he resided, going back and forth from Cincinnati to the mines. He was the managing agent of the Hutchinson Coal Company, which maintained an office at Cincinnati, where Hutchinson kept "an Empire Fuel Company file," "for his personal reference and for the Hutchinson Coal Company," and carried on from Cincinnati such correspondence as was necessary between himself and persons at the mines. But this, standing alone, was not enough to constitute a doing of business by defendant in Ohio. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Green v. Chicago, B. & Q. Ry. Co., supra; Peterson v. Chicago, R. I. & P. Ry. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; Atchison, T. & S. F. R. R. Co. v. Weeks (C. C. A. 5) 254 Fed. 513, 166 C. C. A. 71. Hutchinson also sold in Ohio, to another coal company, three barges of coal, which were loaded from time to time between August 20th and September 26th, in that company's barges at Hugheston, W. Va. But a sporadic or occasional sale in Ohio did not constitute a doing of business therein (Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137); and except as already or hereafter stated defendant seems to have done no business in Ohio, and it kept no books or bank account there.

But this further situation is presented: The contract in suit was personally negotiated at Pomeroy, Ohio, between Hutchinson and plaintiff. It was executed at Charleston, W. Va.; Hutchinson signing for defendant as its general manager, his authority to do so being unchallenged. Hutchinson kept at the Cincinnati office a copy of the contract, the original being kept at defendant's main office at Fairmount. At Cincinnati, while the contract was still subsisting, Hutchinson discussed with plaintiff its "meaning and intent." From

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Cincinnati he conducted correspondence with plaintiff, signing one or more letters in defendant's name by himself as general manager. From Cincinnati, as representing defendant, he sent plaintiff "different telegrams," at least one of which (that of August 2d), relating to the unloading of barges then at Pomeroy, was signed in defendant's name alone. From Cincinnati he inclosed to plaintiff vouchers for the transportation and loading of coal during the months of May and June under the contract in suit; the checks having been sent to Hutchinson from defendant's main office for the correct address, the letter of transmittal being signed in defendant's name by Hutchinson as its general manager. Hutchinson wrote plaintiff from Cincinnati to forward to him at that place an expense bill of about $500 incurred for raising a sunken boatload of coal, and the bill was sent accordingly. On June 23d plaintiff wrote Hutchinson at Cincinnati, as defendant's manager, regarding the loading of fuel coal called for by the contract. Hutchinson replied thereto by letter as defendant's general manager, apparently from Cincinnati. On or about June 1st the loading of coal into plaintiff's barges was suspended, because defendant had then a full supply of cars. From June 29th to August 11th, however, six barges were loaded, all of which were attached by plaintiff before they were unloaded; but the relations under the contract were not broken off until just before this suit was begun. Hutchinson acted for defendant in all the dealings between it and plaintiff relative to the contract in suit, and had no dealings with plaintiff except on behalf of defendant. The contract covered, potentially, at least, an important and substantial amount of defendant's business during the year. Plaintiff construes it as providing absolutely for the transportation of 350 tons per day; defendant construes it as providing for such transportation to the extent that railroad cars were not available. The capacity of the mines was approximately 600 tons per day. This consideration is entitled to weight. Maxwell v. A., T. & S. F. R. R. Co. (C. C.) 34 Fed. 286, 287. The contract called for its performance in Ohio, to the extent of the delivery of the coal at Pomeroy to defendant in railroad cars. The fact of delivery necessitated the furnishing by defendant of cars therefor and the billing of the same to destination.

The Hutchinson Coal Company, of which Hutchinson was the managing agent, "had the agency for the Empire Fuel Company." Hutchinson was at Pomeroy on several occasions (apparently during the period covered by operations under the contract) "seeing that barges were unloaded and cared for." Those barges were said to be "not involved in this suit," whatever that may mean. While there was testimony that the Hutchinson Company's "agent at the mines" was in charge of the unloading and billing out of cars, and that Hutchinson merely went to Pomeroy with him, and while other testimony was susceptible of a construction that the Hutchinson Company bought all defendant's output and itself sold it, the district judge states in his opinion that it was Hutchinson's claim that the Hutchinson Company "as the defendant's agent sells the defendant's coal," and defendant's counsel does not dispute this interpretation. While it may

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be that this is not the correct interpretation of the relations between the Hutchinson Company and defendant, yet, as the record stands, we think it should be accepted. On this state of facts we must accept the court's conclusion that defendant was doing business in Ohio, certainly until the severing of relations between plaintiff and defendant, immediately before the bringing of this suit.

The question remains whether defendant should be regarded as still doing business in Ohio when service of process was made a few days later. The record permits a presumption of defendant's intention, in the regular course of its business, to ship by water to Pomeroy and there load into cars and bill coal, as was contemplated and as was done under the contract with plaintiff, whenever there should be a shortage of railroad cars. We think the burden of proof was upon defendant to overcome that presumption, and that this has not clearly been done. Previous to the contract with plaintiff defendant had had "a river connection" with other people for whom plaintiff was substituted; and the record introduced by defendant upon the hearing on the merits justifies the inference that in September, when the supply of cars was less complete, a river connection was resumed with still a third party, and deliveries made thereunder, presumptively at Pomeroy, for the purpose of shipment from that place. "Doing business" within a state does not necessarily require that it be done persistently and continuously. New Haven Co. v. Downington (C. C.) 130 Fed. 605. No all-embracing rule as to what is "doing business" has been laid down. St. Louis S. W. Ry. v. Alexander, 227 U. S. 218, 227, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1914C, 77. The question whether defendant was doing business in Ohio is one of fact. Oakland Co. v. Wolf Co. (C. C. A. 6) 118 Fed. 239, 55 C. C. A. 93. It does not follow from the fact that the contract was made in West Virginia that all business done under it must be regarded as done in that state. Lumbermen's Ins. Co. v. Meyer, 197 U. S. 407, 414, 25 Sup. Ct. 483, 49 L. Ed. 810. Even if no one of the things Hutchinson did for defendant in Ohio was enough to constitute doing business there, and while the question presented is a close one, we think the record, taken together, sustains the conclusion of the District Judge that defendant was doing business in Ohio. We think the case within the principle (although not within the facts) of such decisions as St. Louis S. W. Ry. v. Alexander, supra; Mutual Life Ins. Co. v. Spratley, 172 U. S. 603, 19 Sup. Ct. 308, 43 L. Ed. 569; Lumbermen's Ins. Co. v. Meyer, supra. The instant case is in important features distinguishable from cases specially relied on by defendant.

[7, 8] 2. *The Trial on the Merits.* Defendant had at Hugheston both a rail and a river tipple. It could ship to Toledo either by rail directly from Hugheston, or by river barge down the Kanawha river to the Ohio river and then up the Ohio to Pomeroy, and by rail from that place. Plaintiff had 14 barges, of an average capacity of more than 500 tons each, and a steamer. The contract contained the following provisions, omitting immaterial matter, and substituting the titles of the parties here for their designations there:

(a) For the expressed consideration of $1 ["and the further consideration of the right to handle all of the coal of the Empire Fuel Company, except as

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hereinafter provided, which is run over the river tipple to the Kanawha river at the Empire Fuel Company's mine at Hugheston * * * which is hereby granted"] plaintiff bound himself "to furnish sufficient barges at the said mine in which to load not less than 350 tons of coal per day," and further "to transport all such coal to Pomeroy * * * by way of the Kanawha and Ohio rivers, and to load all such coal into such cars as may be furnished at Pomeroy, Ohio."

(b) Should plaintiff "at any time, fail to furnish sufficient barges, beyond the necessary barges to load the said 350 tons per day, to load all of the said coal which the [defendant] is able to run to the river * * *" defendant was given "the right at any time to load such coal into other barges which" defendant "may be able to procure, at all times, however, giving [plaintiff] the preference as to such barges as [plaintiff] may have at the tipple at such time."

(c) Defendant (1) assumed responsibility "for all barges" of plaintiff while being loaded and until removed by plaintiff, provided they be removed within a reasonable time after loading; (2) agreed to pay plaintiff "$1 per ton for all such coal transported and loaded as aforesaid, settlement therefor to be made by the 20th of each month for all coal shipped from said mine during the previous month"; (3) agreed "to furnish billing for all coal so transported by [plaintiff]"; (4) agreed "to sell to [plaintiff] run of mine coal for fuel purposes not to exceed 26 tons per day at the rate of $1.50 per ton at the tipple."

(d) The contract was declared "subject to all contingencies which might arise which are not within the control of either of the parties hereto." (Brackets and paragraph letters are ours.)

The rail rate from Hugheston to Toledo was 25 cents per ton more than from Pomeroy to Toledo. Shipment under the contract in suit would thus cost defendant 75 cents per ton more than by all rail route. On the other hand, the United States had but a few months before entered the war; there was a great demand for coal and the price was very high; there was a marked shortage of cars, the allotment to defendant when the contract was made being but 32 per cent. of its production, which was then between 500 and 600 tons per day, and defendant hoped to increase the capacity by at least 100 tons per day. On June 4th defendant's car allotment was increased to 100 per cent., and it stood at that figure almost constantly until October 8th; during the greater part of the remainder of the year it ranged from nothing to 100 per cent. This suit grew out of defendant's refusal to furnish coal for plaintiff's barges when it had sufficient cars.

Defendant contends that the contract clearly and unambiguously bound it to furnish plaintiff coal only when cars could not be had. If this contention is right, the judgment is wrong, and should be reversed; for it is a commonplace that the construction of an unambiguous contract is for the court, notwithstanding the construction involves a consideration of attendant conditions and circumstances not in dispute. Plaintiff, however, contends that the contract required defendant to provide the stipulated tonnage, without regard to car supply. The trial court thought the contract ambiguous in this respect, and submitted its construction to the jury. The verdict sustains plaintiff's construction. If that construction is right, defendant has nothing of substance to complain of, for all its assignments of error relating to the merits (except the sixth) are, in that event, concededly not well taken, and the sixth assignment is without apparent merit.

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The writing, judged only by its language, is not in our opinion free from ambiguity. True, the clause in paragraph (a) which we have bracketed recites only a right on plaintiff's part to handle coal "which is run over the river tipple." But this clause is only a recital; it is not a positive limitation. Assuming, however, that the bracketed clause, standing alone, would limit defendant's obligation under the contract to such coal as it could not get cars for, yet there is opposed to this recital an absolute agreement on plaintiff's part not only "to furnish sufficient barges * * * in which to load not less than 350 tons of coal per day," but "to transport all such coal"; and this latter clause may as naturally refer to the "350 tons of coal per day" as to the earlier clause "which is run over the river tipple." The bracketed recital is not, in our opinion, necessarily inconsistent with an implied obligation on defendant's part to furnish as much coal as plaintiff was absolutely required to transport, especially in the absence of any mention whatever of car supply or car shortage, much less of a positive declaration—which it would be natural to make if such was the intention of the parties—that defendant was required to run to the river tipple only its surplus above what the car supply, as existing from time to time, would take care of. Furthermore, paragraph (b) gives defendant the right to use other barges in case of plaintiff's failure to furnish barges enough to load, not merely "the said 350 tons per day," but "all the coal which defendant is able to run to the river"—an expression which, standing by itself, naturally implies ability rather than choice. Provisions (1) and (2) of paragraph (c) also naturally imply that plaintiff was expected to transport coal each month.

Without discussing in detail each of the considerations advanced pro and con, we think the language of the contract, giving effect to all of its terms, is ambiguous in the respect mentioned.

It is urged, however, that it is unreasonable that defendant should agree to pay 75 cents more per ton for river and rail than for all rail transportation, or that it should trust to the uncertainties of river navigation due to winter ice, as well as low water and floods. But we cannot say, as matter of law, that defendant might not reasonably have been willing to bind itself, under existing market prices, to transport one-half its output at an advanced rate of 75 cents per ton, rather than take its chances of the continuance of the then existing car shortage, or that it would be more unreasonable that defendant should take chances on river navigation as to one-half its output than that plaintiff should tie up his 14 barges, said to have a rental value of $10 per day each, as well as his steamer (and defendant presented evidence that all plaintiff's equipment was required to transport 350 tons per day), on the chance of getting no coal to carry unless the car shortage should continue. Our conclusion is that the District Court was right in submitting to the jury the question of the actual intent of the contract.

[9, 10] As to the evidence of intention: Plaintiff testified that he refused to sign the contract as first drawn because "I did not think it specified the amount of coal I was to boat," and because of its omission of certain other provisions; that he stated he "had to know what

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he was going to do, and how many tons he was to get per day, so he would know how much work he had for his steamboat and barges"; that "the lawyer took the original draft and interlined it and changed it, so it specified 350 tons," as well as covered the other omissions referred to. Opposed to this is the testimony of three witnesses, who, while agreeing that plaintiff made substantially the objections stated, declare that he was explicitly told that he was to get no coal when defendant had enough cars, and that the other criticized omissions only were covered by the redraft. There was also evidence of statements by plaintiff, both oral and by letter, and of other circumstances, more or less inconsistent with his present claim. Were we called upon to decide this question of fact from the printed record, we might think defendant's version the more reasonable one; but plaintiff's testimony was direct and unequivocal, and, if believed, supports the verdict. Moreover, the trial court denied a motion for a new trial. We cannot weigh the evidence or determine the question of fact.

[11] 3. *The Cross-Writ.* (a) On motion to discharge the attachment, the District Judge held the affidavit therefor insufficient. Plaintiff was, however, given permission to file another affidavit and "start anew his attachment proceedings"; in default thereof the motion to dissolve to be sustained; in either event plaintiff to pay the costs of the attachment and of motion to dissolve. Plaintiff thereupon filed a new affidavit and took out a new attachment. Under writ of error in No. 3255 plaintiff asks review of the judgment of dismissal. Practically a question of costs only is involved. We are not convinced that the criticized action constituted reversible error. If, as claimed, the affidavit was amendable, it does not affirmatively appear that plaintiff asked leave to amend.

[12] (b) Plaintiff also asks that this court enter judgment for $510 additional damages, for the expense of raising a sunken barge. The item was excluded from the jury's consideration, as "not in controversy in this case," plaintiff's counsel say, on the ground that the item was recoverable only in admiralty. It is said: "There is or can be no dispute" about the item. We are unable to direct a modification of the judgment in this respect, for the reason, if for no other, that we cannot say from the record that defendant's liability for the item was conceded, or that there was no room for contesting it.

[13, 14] (c) Plaintiff asked upwards of $87,000; he recovered $10,400. He now asks that this court "order an assessment of additional damages," on the ground that the verdict was insufficient, and was made smaller than it should have been because of alleged erroneous rulings and action of the trial judge. This we cannot do. There is authority for ordering a new trial upon a particular branch of a controversy. We have reversed judgments, with remand for trial upon an issue relating to jurisdiction, without setting aside the verdict for damages. Chicago, R. I. & P. R. R. Co. v. Stephens, 218 Fed. 535, 540, 134 C. C. A. 263; Fentress Co. v. Elmore, 240 Fed. 328, 333, 153 C. C. A. 254. The Circuit Court of Appeals for the First Circuit has awarded a new trial on the subject of damages alone. Farrar v. Wheeler, 145 Fed. 482, 75 C. C. A. 386. And see Calaf v.

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Fernandez (C. C. A. 1) 239 Fed. 795, 152 C. C. A. 581, and Mine v. Mining Co. (D. C.) 254 Fed. 630.

But plaintiff does not ask to have the judgment in his favor set aside, except or unless for purpose of assessing additional damages; he apparently seeks to hold onto his present recovery, and, without jeopardizing that, to try to increase it. There may be cases where the recovery had is so palpably right so far as it goes, and yet so palpably insufficient in amount, as to justify the course asked here. We need not determine that question, for this case is not of that class in either of the two features mentioned.

The judgment of the District Court is affirmed. The defendants in error in the respective writs will recover costs thereunder.

(257 Fed. 898)

ESCANABA TRACTION CO. v. BURNS et al.

BURNS v. ESCANABA TRACTION CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1919.)

Nos. 3213, 3214.

1. APPEAL AND ERROR ⟸1010(1)—REVIEW—FINDING OF FACT.
Where there was express testimony supporting the District Court's conclusion on an issue of fact (where testimony was taken in open court), the Circuit Court of Appeals is bound to accept such conclusion, unless the evidence decidedly preponderates against it.

2. ATTORNEY AND CLIENT ⟸98—PAYMENT TO ATTORNEY UNDER AUTHORITY OF ASSIGNEE—LIABILITY OF SETTLOR FOR MISAPPLICATION.
A traction company, which paid money due contractors to an attorney under authority therefor by a lender to and holder of an assignment from the contractors was not liable to the lender and assignee for the attorney's claimed misapplication of the funds in part.

3. SUNDAY ⟸11—CONSENT TO SETTLEMENT—INVALIDATION.
Though a lender to and holder of an assignment from a firm of contractors which did work for a traction company gave his consent on Sunday to a settlement of the contractors' claim against the traction company, the settlement was not, under the facts of this case, invalidated, though the statutes of both states where the transactions occurred make Sunday contracts invalid.

4. SUNDAY ⟸15—CONSENT TO SETTLE JUDGMENT—RATIFICATION.
Where the lender to and holder of assignment from a firm of contractors which had done work for a traction company on Sunday gave consent to his attorney, acting also for others interested, to settle the contractors' judgment claim against the traction company, and did not withdraw the authority given during the two days which elapsed until the settlement was actually made, such lender and assignee is estopped from denying, as against the traction company, in suit to set aside satisfaction of judgment by it, that his consent to the settlement had legal efficacy.

5. COMPROMISE AND SETTLEMENT ⟸19(2)—SETTING ASIDE SETTLEMENT—EQUITABLE CONSIDERATIONS.
Equity would not set aside satisfaction of judgment in favor of contractors against a traction company, effected between the company and a lender to and holder of assignment from the firm of contractors, as well as others interested, where under the facts such action would not accord with equity and good conscience.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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6. ASSIGNMENTS ⟸58—PARTIAL ASSIGNMENTS IN EQUITY.
Though it is the general rule at law that a debtor will be protected against the splitting up of claims against him, the rule has no application in equity, which can adjust the rights of all interested in a single suit, and it is settled doctrine in the state and federal courts that partial assignments are enforceable in equity, irrespective of acceptance by the debtor, and though made only by way of security; the sole control of the claim so assigned, as regards its settlement, not being regarded as left with the debtor.

7. COMPROMISE AND SETTLEMENT ⟸19(2)—SETTING ASIDE—CONDITION PRECEDENT—REINSTATEMENT OF PROCEEDING TO REVIEW JUDGMENT SETTLED.
In suit to set aside settlement by a traction company of judgment against it in favor of a firm of contractors who had assigned to lenders to them, reinstatement of writ of error from the Circuit Court of Appeals for review of the judgment *held* not a condition precedent to relief to plaintiffs, the lenders to and holders of assignment from the contractors, who had nothing to do with the dismissal of the writ of error or the discharge of the judgment.

8. SUBROGATION ⟸1, 31(1)—FAILURE TO PAY CLAIM IN FULL—BENEFIT OF RELEASE OF SECURITY.
Where a traction company, which had employed a firm of contractors, did not pay in full the claim of a lender to and holder of an assignment from the contractors in settling with the attorney for the lender a judgment against it in favor of the contractors, as against other lenders to the contractors it was not entitled on any theory of subrogation to the benefit of the release of the security held by the lender, when judgment in favor of the contractors against the traction company was settled by the attorney for such lender; "subrogation" not being matter of legal right, but merely the mode which equity adopts to compel the ultimate payment of a debt by one who in justice should pay it.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subrogation.]

9. APPEAL AND ERROR ⟸977(1)—EQUITY ⟸392—APPLICATION FOR REHEARING—DISCRETION OF TRIAL COURT.
Application for rehearing was addressed to the sound discretion of the trial judge, a discretion not reviewable on appeal, in the absence of a showing of its abuse.

Appeals from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by Joseph Burns and others against the Escanaba Traction Company, the Escanaba National Bank, and others. From the decree, plaintiff Joseph Burns and defendant Traction Company appeal. Decree affirmed.

Eben R. Minahan, of Green Bay, Wis., for appellant Burns.

Thomas J. Riley, of Escanaba, Mich., and G. F. Clifford, of Green Bay, Wis., for appellant Escanaba Traction Co.

Thomas Clancey, of Ishpeming, Mich., for appellee Escanaba Nat. Bank.

Charles M. Owen, of Grand Rapids, Mich., for appellees Burns and others.

Before WARRINGTON and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. John Brogan and one Rich, copartners as Brogan & Rich, had a contract with the Escanaba Traction

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Company for certain construction work. In a suit on the law side of the court below, for breach of this contract, Brogan & Rich obtained verdict against the traction company on April 17, 1914, for $15,759.16 damages. Judgment was rendered on the verdict December 17th following, and from that judgment writ of error was taken from this court. In the performance of the construction contract, Brogan & Rich borrowed from the Escanaba National Bank $7,000, giving the bank therefor an order on the traction company April 6, 1912, which was accepted by the latter two days later. Brogan had borrowed from four of his relatives sums amounting to $16,000, as follows: From Joseph Burns $7,000, from Ellen Burns $3,000, from Catherine Kane $3,500, and from James Brogan $2,500. Part, at least, of these sums was used in performing the construction work in question. After verdict, and before judgment, Brogan & Rich, by Brogan, gave to each of the latter's four relatives a formal written assignment of their entire claim against the traction company, reciting the pendency of suit thereon in the United States court, each assignment stating that it was "given to secure" the person named "for a loan of money" made to the firm in the specific sum stated, which was in each case the principal of the loan. No question is made of Brogan's complete authority to so act for the firm. The assignment to Ellen Burns was in terms made "subject to a previous assignment of the same funds in favor of Joseph Burns," the assignment to Catherine Kane subject to the assignments to both Joseph and Ellen Burns, and that to James Brogan to the assignments to each of the other three. The traction company was fully informed of these assignments, being served with a copy of each.

On March 16, 1915, Brogan & Rich, through Brogan, and with the participation of the attorneys who had represented them in securing the judgment, effected a settlement with the traction company, whereby the latter paid $12,500, of which $7,700 was paid by the traction company to the bank in payment of its claim, with interest thereon, the remaining $4,800 being paid by the traction company to Messrs. Martin, Martin & Martin, attorneys for Brogan & Rich. The judgment against the traction company was thereupon formally discharged, and under stipulation of counsel the writ of error from this court was dismissed. No question of Brogan's authority to represent Brogan & Rich in making this settlement is involved. Martin thereupon paid Ryall $400 for his services as attorney for Brogan & Rich in the suit against the traction company, paid Calnan & Riley $723.38 in settlement of a claim presented by them as members of the firm of John Brogan & Co., for work done and materials furnished under a subcontract for the construction work in question, retained for themselves $1,835, partly for services rendered and expenses incurred in the suit against the traction company and partly for services and expenses in connection with other suits in which John Brogan and others were interested, and tendered to Joseph Burns the remaining $1,831.72, which Burns refused to accept.

Joseph and Ellen Burns, Catherine Kane, and James Brogan thereupon brought the instant suit, to set aside the satisfaction of the judgment against the traction company and for an accounting with the sev-

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eral defendants. The traction company and the bank appeared and answered on the merits. Upon hearing on pleadings and proofs, the court below found, first, that the settlement was authorized by and is binding upon Joseph Burns, as a release of the security of his assignment of the judgment, entitling him to the remaining $1,831.72, and without prejudice to his right to recover, by suit or otherwise, from defendant Martin and defendants Calnan & Riley (who, being nonresidents and without the jurisdiction, were not served with process and did not appear), "any moneys which may have been unlawfully retained by the one or paid to the other out of the balance of $4,800 received from said defendant company"; second, that the settlement was without authority or consent of the plaintiffs Ellen Burns, Catherine Kane, and James Brogan, and that these three plaintiffs are entitled to have the settlement set aside as to the balance of the judgment, including costs and interest, after the application of the $12,500 actually paid thereon, and to receive such balance in the priorities before stated; and, third, that the national bank was authorized to receive the $7,700 in question out of the settlement, and was so authorized by plaintiff Joseph Burns. Decree was entered accordingly. The traction company appeals (No. 3213) from so much of the decree as requires it to pay the balance of the judgment against it. Joseph Burns appeals (No. 3214) from the refusal to allow him further relief than stated.

[1, 2] 1. *Joseph Burns' Appeal.* Previous to the settlement Burns' claim had been reduced by payment of $2,000 on the principal. Complete relief was denied him on the ground that he authorized the settlement at $12,500. He was present at a conference between Brogan and his counsel, at Martin's home in Green Bay, Wis., for the purpose of considering the question of settlement, which was accomplished two days later. Burns' express assent to a settlement at $12,500 is claimed to have been given at this conference. On this question of fact the trial court said:

"Did Joseph Burns authorize or consent to the settlement? Upon this question the testimony is in sharp conflict. Burns not only denies that he gave his consent to the settlement, but asserts that he refused to consent thereto. His testimony is corroborated to some extent by that of John Brogan and one other witness and by the fact that he refused to sign a power of attorney authorizing Brogan to act for him in the settlement. On the other hand, the two attorneys who negotiated the settlement are equally positive in their statements that Burns authorized them to act for him. These attorneys are men of integrity and high standing in their profession. That they believed themselves to be clothed with full power to act cannot be doubted. Burns knew approximately the amount of money which could be obtained; he did not openly object to the settlement until after it had been made and he had discovered the small amount he was to receive. From the whole record it fairly appears that the attorneys were authorized by Burns to settle the judgment for the sum of $12,500."

The entire testimony in the case, except that of Rich, who did not attend the conference, was taken in open court. There was express testimony supporting the court's conclusion; and this conclusion we are bound to accept, unless the evidence decidedly preponderates against it. Cleveland v. Chisholm (C. C. A. 6) 90 Fed. 431, 33 C. C. A. 157;

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Pugh v. Snodgrass (C. C. A. 6) 209 Fed. 325, 126 C. C. A. 251. There is no such preponderance.

It seems reasonably clear that both Martin and Ryall understood Burns to give them the claimed authority. They say that both Brogan and Burns understood that $12,500 might prove to be all the traction company would pay; that Burns told them to "do the best you can, get $13,000 if you can, but do the best you can"; and that the settlement was made in reliance upon this authorization from Burns and a similar one from Brogan. While there is evidence of assertion by the attorneys that they would exercise the right to settle, even if the consent in question was not given, we think the testimony falls short of proving duress.

Burns was naturally disappointed with the amount left for him. The interest on the bank's claim made it $200 greater than treated at the conference; but the trial court was clearly right in recognizing the bank's lien at $7,700 and as prior to plaintiffs' liens. The claim of Calnan & Riley, however, was not mentioned at the conference. They had in fact no lien upon the judgment. Its payment is defended largely on the ground that the services it represented entered into the amount of the recovery against the traction company; and Martin, who represented Calnan & Riley also, had agreed to see to its payment. Brogan, however, had given what he asserts to be adequate security for the claim and was unwilling to have the deduction made. The services and disbursements of Martin's firm, for which he retained $1,835.00, included items amounting to several hundred dollars rendered in other matters, for which no lien could be claimed. The right to retain or disburse these items was open to controversy. But the traction company, having in good faith paid the money to Martin, under authority therefor by Joseph Burns, was not liable to him for Martin's claimed misapplication in part; and the proper course was taken in not passing upon those items, and in making the award to Burns without prejudice to future recovery on account of them.

[3-5] We see no merit in the contention that the fact that Burns' consent was given on Sunday is enough to invalidate the settlement. True, the statutes of both Wisconsin and Michigan make Sunday contracts invalid; although in Wisconsin the case would seem to fall within the rule that where both parties are equally guilty of a violation of law the courts will give relief to neither. Cohn v. Heimbauch, 86 Wis. 176, 180, 56 N. W. 638. Apart, however, from this consideration, the settlement was not made until two days after the authority was given, and meanwhile Burns made no attempt to withdraw his consent. In executing the settlement Martin claimed to act as attorney in fact for Burns as well as for several others interested, and signed the papers in such capacity. It is not claimed that the traction company had reason to believe that Martin's only authority from Burns was one given on Sunday. The settlement seems to have been made in good faith by both the traction company and the attorneys for the judgment plaintiffs. These circumstances should estop Burns from now denying, as against the traction company, that his consent had legal efficacy. Bronson's Executor v. Chappell, 12 Wall. 681, 20 L. Ed. 436; Gibbs Co. v. Bruck-

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er, 111 U. S. 597, 4 Sup. Ct. 572, 28 L. Ed. 534. Moreover, Burns is in a court of equity asking equitable consideration. To set aside the settlement as to Burns would not, under the facts stated, accord with equity and good conscience. Blakesley v. Johnson, 13 Wis. 592. We think the decree as to Burns should be affirmed.

2. *The Traction Company's Appeal.* At the date of the decree below the balance of the Brogan & Rich judgment against the traction company, above the $12,500 paid on the compromise, was $4,547.97. This amount was ordered paid to Ellen Burns, Catherine Kane, and James Brogan, the face of whose claims aggregated $9,000, in the order of priority given by the respective assignments.

(a) The contention that these appellees consented to or authorized the settlement needs little attention. On this subject Judge Sessions said:

"The other plaintiffs [those other than Joseph Burns] not only were not represented and did not participate in the negotiations, but positively refused to appoint an agent to represent them or consent to the settlement."

The record so amply supports this conclusion as to make discussion or statement of evidence unnecessary.

(b) The traction company, however, urges that the assignment, being merely by way of security and not absolute, being not of the entire claim, but only of part thereof, and the control of the claim being left with the assignor, the transaction amounted to a splitting up of the claim and rendered the assignments unenforceable against the traction company, except so far as accepted by it. In a fair sense, the record indicates a practical, although not a formal, acceptance by the traction company of the assignments. The whole theory upon which its defense below was rested recognized that the assignments were valid and binding upon the traction company. Its answer admits notice of the assignments and the receipt of copies of the same, and alleged "that in making the settlement" it "relied expressly upon the terms and conditions of said assignments thus served upon" it.

The real contention in this respect is that each of the four plaintiffs authorized the attorneys for Brogan & Rich to make the settlement, but that, even if Catherine Kane and James Brogan did not give the authority, Joseph and Ellen Burns did, and that the traction company was protected by that consent, inasmuch as the claims of the two Burns were more than enough to exhaust the remnant of the judgment. The traction company's manager, who made the settlement, testified:

"I knew of these assignments before I went out. I knew, because they were served on me, sent by mail to me, copies of each assignment."

He also said he had read them, and knew they were expressly "subject one to the other after Joseph Burns," and again:

"I relied upon the statements in the assignments in making the release. I would not have made this settlement in the way we did, if it had not been that those assignments were made subject to Joseph Burns."

The learned counsel who represented the traction company on the hearing below stated, in answer to the court's question, that "we do not

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make any claim as against assignees who are shown not to have authorized the settlement." The contention made here that the assignments are unenforceable is not well taken.

[6] While it is the general rule at law that a debtor will be protected against being harassed by a dividing up of the claim against him, this consideration has no application to equity, which can adjust the rights of all interested in a single suit; and it is the settled doctrine, not only of the federal courts but of the state courts generally, that such partial assignments are enforceable in equity, without regard to the question of acceptance by the debtor, and although made only by way of security. The sole control of the claim thus assigned, as affects its settlement, is not regarded as left with the debtor. Peugh v. Porter, 112 U. S. 737, 742, 5 Sup. Ct. 361, 28 L. Ed. 859; Fourth St. Bank v. Yardley, 165 U. S. 634, 644, 17 Sup. Ct. 439, 41 L. Ed. 855; Rogers v. Penobscot Mining Co. (C. C. A. 8) 154 Fed. 606, 615, 83 C. C. A. 380; Railway Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924; Line v. McCall, 126 Mich. 497, 507, 85 N. W. 1089; James v. Newton, 142 Mass. 366, 377, et seq., 8 N. E. 122, 56 Am. Rep. 692; Lanigan v. Bradley Co., 50 N. J. Eq. 201, 204, et seq., 24 Atl. 505; Exchange Bank v. McLoon, 73 Me. 498, 505, et seq., 40 Am. Rep. 388; Alexander v. Munroe, 54 Or. 500, 509, et seq., 101 Pac. 903, 103 Pac. 514, 135 Am. St. Rep. 840. And see The Elmbank (D. C.) 72 Fed. 610, 614 (opinion by Judge Morrow). On the point generally that an assignment of a chose in action as security merely is enforceable in equity, see Curtis v. Walpole (C. C. A. 1) 218 Fed. 145, 147, et seq., 134 C. C. A. 140. We find nothing to the contrary of this rule in the earlier cases of Kendall v. United States, 74 U. S. (7 Wall.) 113, 116, 19 L. Ed. 85, and Mandeville v. Welch, 5 Wheat. 277, 288, 5 L. Ed. 87, especially when the facts of those cases are taken into account.

[7] (c) The traction company contends that in any event equity requires, as a condition precedent to relief to those appellees, that the proceeding for review by this court of the judgment of the District Court should be reinstated. We cannot assent to this proposition. Appellees had nothing to do with the dismissal of the writ of error or with the discharge of the judgment entered in the District Court. Those steps were part and parcel of a settlement with which they had nothing to do, and as to which they were not consulted, except as some or all of them were asked to authorize John Brogan to act for them. It is true that before the settlement the judgment was subject to reversal, and in such event to the expense and risk of a new trial. But, as the case then stood, the plaintiffs in the judgment, as well as other claimants (thus including Joseph Burns, the bank, Calnan & Riley, and the attorneys for Brogan & Rich), were interested in sustaining the judgment, as well as in prosecuting a new trial in case of reversal. As the case now stands, appellees would be compelled to bear the sole burden, risk, and expense of defending the present judgment, as well as of prosecuting a new trial if ordered, all for a possible recovery of a margin above $12,500.

[8] (d) The traction company insists, finally, that the release of the security held by Joseph Burns inured to the benefit of the traction com-

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pany to the full amount of the debt secured by the assignment to him. Had the traction company paid Joseph Burns' claim in full, it would be entitled to this benefit; but this it did not do, or even assume to do, and we therefore think the contention referred to was rightly overruled. The settlement was primarily of the traction company's debt to Brogan & Rich. The assignment of that debt to Burns was simply to secure him for what Brogan & Rich owed him. The traction company's only concern in respect to the assignees was to make sure that in settling with Brogan & Rich it was protected against further claims by the assignees. The settlement papers recited the payment of $7,700 to the bank and $4,800 to Brogan & Rich, Calnan & Riley, and Joseph and Ellen Burns. In consideration of these payments Brogan & Rich and the traction company formally released each other from all claims and demands, and the traction company was in addition released from all claims and demands "on account of said claim of Calnan & Riley and on account of said assignments herein referred to," viz. those to Joseph and Ellen Burns. The traction company was merely paying its own debt. The debt from Brogan & Rich to Burns was not paid, except to the extent of the moneys applied upon it. The theory on which one paying a debt is, under certain circumstances (as of suretyship, trust or other equitable relation), subrogated to the benefit of the security held for the debt has, in our opinion, no application to the present situation. Subrogation is not matter of legal right; it is merely "the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it." Arnold et al. v. Green, 116 N. Y. 566, 571, 23 N. E. 1, 2. It is impossible to bring this case within that definition. Judge Sessions well said:

"The release of the security did not constitute payment and discharge of the debt beyond the amount actually paid and applied thereon. The most that can be claimed for Joseph Burns' assent to the settlement is that, in consideration of the payment to him of whatever sum might remain from the $12,500 after the satisfaction of all valid prior claims or liens upon the fund, he released and discharged his lien upon the judgment. * * * Burns was the antagonist of the traction company, and, in agreeing to the settlement, was acting solely in the interest of himself and the other assignees. He agreed to and did release and surrender his security and nothing else. The traction company obtained from him such release and nothing else."

If Burns saw fit to release his security on receiving less than due him, there is, in our judgment, no more inequity as against the traction company in giving the subsequent security holders the benefit of the remaining security than if Burns' debt had been decreased by payment directly through Brogan & Rich, instead of indirectly through the traction company. The whole difficulty in this respect has grown out of the fact that the traction company mistakenly accepted the authority of Martin to act for both Joseph and Ellen Burns, coupled with the assumption that the other plaintiffs had no concern with what was done.

We are the better satisfied with this conclusion from the facts (not, however, forming its basis) that, although the traction company is protected by the form of the assignments to the extent of what was ac-

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tually paid Burns, both Brogan and Joseph Burns seem to have regarded the assignments as intended, as between the assignees, to secure them ratably and without preference, and that, according to what was evidently Burns' understanding of the settlement, nearly $3,000, or more than 50 per cent., of the amount of his debt would have been paid.

While by the decree below the three appellees will normally receive through the traction company in the aggregate (one at least individually) more than they would had the judgment against Brogan & Rich been originally paid in full, yet not only is this result at the expense of Burns, and not of the traction company, but the remnants of their respective debts against Brogan & Rich are correspondingly decreased.

[8] The application for rehearing was addressed to the sound discretion of the trial judge, a discretion which is not reviewable here in the absence of showing of its abuse. Such showing is not made.

We have carefully considered all the criticisms made to the decree below, although we have not discussed them all. We find no error in the decree, and it is accordingly affirmed.

(257 Fed. 906)

GILL et al. v. HALE & KILBURN CO.

(Circuit Court of Appeals, Sixth Circuit. January 10, 1919.)

No. 3166.

1. CONTRACTS ⟸261(5)—RESCISSION—AUTHORITY OF PARTIES.
   If time was of the essence of plaintiff's subcontract to install the metal doors in a building, etc., so far as concerns plaintiff's right, as distinguished from its obligation, to complete its work by a certain date, and defendants, the general contractors, did not have the building ready for installation of the doors at the time fixed for completion of the subcontract, plaintiff had the right to cancel such contract at the expiration of that date.

2. TRIAL ⟸136(1)—PROVINCE OF COURT AND JURY—REASONABLE TIME.
   It is a general rule that questions of reasonable time and reasonable delay are for the jury.

3. PRINCIPAL AND AGENT ⟸177(3)—NOTICE TO AGENT.
   Where plaintiff's representatives consulted with defendant contractor as to details of the subcontract which plaintiff had undertaken, information and knowledge so acquired by such representatives as to progress of defendant's work was that of plaintiff.

4. CONTRACTS ⟸323(3)—CONSTRUCTION—TIME.
   Where the general contractors were required to complete within a specified time, and they let a subcontract for the metal doors, etc., to be completed October 1, time was not of the essence of the contract, so far as concerned the subcontractor's right, as distinct from its obligation, and so the fact that the general contractor was unavoidably delayed, and did not have the building far enough advanced for the doors to be installed at the time fixed for completion of that work, did not, as a matter of law, warrant the subcontractor in canceling its contract.

5. CONTRACTS ⟸323(3)—CONSTRUCTION—REASONABLE TIME.
   Whether the delay of the general contractor in completing the building to such a point as would allow subcontractor to install metal doors, etc.,

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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before expiration of the time for completion of the subcontract, was so unreasonable as to warrant the subcontractor in canceling its contract, *held*, under the evidence, for the jury.

6. CONTRACTS ⇐323(3)—QUESTION FOR JURY.

In subcontractor's action against contractor for damages for failing to permit plaintiff to perform prior to time when plaintiff's contract was to be completed, whether plaintiff had waived, or by its conduct was estopped to urge, defendant's failure to permit plaintiff to perform, *held* for the jury.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by the Hale & Kilburn Company against John T. Gill and Kermode F. Gill, copartners doing business under the name of John Gill & Sons, who counterclaimed. There was a judgment for plaintiff, the counterclaim being dismissed, and defendants bring error. Reversed and remanded, with directions.

W. C. Boyle, of Cleveland, Ohio, for plaintiffs in error.

Merle N. Poe and Ralph Burroughs, both of Cleveland, Ohio, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and KILLITS, District Judge.

KNAPPEN, Circuit Judge. Plaintiffs in error, whom we style defendants, had a contract for altering and extending a building in Cleveland, Ohio, which was to be completed January 1, 1916. In April, 1915, they made a subcontract with defendant in error (the plaintiff), whereby the latter agreed, for a stated price, to furnish and install the metal doors and trim, picture molding, and base, and to apply the hardware, such installation to be completed by October 1, 1915. On October 16, 1915, the building had not progressed far enough to permit plaintiff to begin its work, and on that date plaintiff gave defendants notice of its rescission of the contract, and brought this suit for the recovery of damages sustained by defendants' failure to permit plaintiff to perform. Defendants denied plaintiffs' right to rescind, and asked for damages by way of counterclaim for plaintiff's refusal to perform. The jury was instructed that under the undisputed testimony plaintiff had the right to refuse to go on with its contract, that defendants had thus no right of action under their counterclaim, and that plaintiff, if not then itself in default, was entitled to recover its damages. Plaintiff recovered verdict and judgment for $7,500. This proceeding is brought to review that judgment.

[1-6] 1. The question of prime importance is whether the court rightly held, as matter of law, that plaintiff had a right to rescind on October 16th. Defendants' construction was delayed several months by controversies with the city over questions arising under its building code relating to the height of the building and structural strength, by the unforeseen necessity of deeper foundations, the encountering of

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quicksand and otherwise, all resulting in defendants' losing their order of priority with the steel manufacturers. For these delays plaintiff was in no way at fault. Its actual installation could not begin until the building was ready for the "bucks," which are heavy steel frames outlining the openings and into which the tile partitions enter, and which thus support the metal work. The bucks could not be put in until the lower floors were laid, and from one to three months thereafter would be required (according as the claims of plaintiff or defendants are accepted) for completing plaintiff's work.

On July 13, 1915, defendants replied to plaintiff's inquiry that—

"We expect the steel work to go right ahead now, and in all probability will not require the steel bucks before September or October, and will advise you later on when we receive the steel drawings and give you outlines as to dates of delivery."

On September 7th defendants replied to like inquiry:

"We expect to have the steel for approximately up to the third floor shipped and erected by the end of next month, and as soon as they start on the upper portion the tile floors will follow right along."

In the latter part of September plaintiff learned definitely that the building would not be ready in October for its installation, and it thereupon gave, on October 16th, its notice of rescission. As it turned out, the building was not ready for the bucks before December. It is enough, for present purposes, to say that it must be, and it is, conceded that as the result of the correspondence and dealings between the parties plaintiff waived whatever right it had, to complete the contract by October 1st.

Had time been of the essence of the contract, so far as concerns plaintiff's right (as distinguished from its obligation) to complete its work by October 1st, and had the waiver been for a definite period or to a definite date, plaintiff would have had the absolute right to cancel at the expiration of that date. General Elec. Co. v. Chattanooga Co. (C. C. A. 6) 241 Fed. 38, 42, 154 C. C. A. 38. But, in our opinion, neither of these conditions existed. The contract did not in terms make time of its essence, so far as concerns the plaintiff's right to complete by October 1st. Such was the implied effect as to its obligation. But the obligatory provision was for defendants' benefit. The reason for a difference between the rights of the parties in this respect is clear. Defendants were under contract with the owner to complete by January 1, 1916, with stipulation for damages at $100 per day for delay. The fact that the delay occurred through the fault of the subcontractor would not avoid defendants' liability. Plaintiff accordingly agreed to like stipulated damages in case of its delay, but for delays not occurring through its fault it would not be liable. The contract, moreover, expressly provided for a suspension from time to time of such parts of the work as defendants should require, and for a resumption of performance thereafter according to defendants' direction, no claim therefor to be made other than an extension of time for completion equivalent to the delay involved. It was also provided that plaintiff's work should be performed and completed as soon as the progress of the build-

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ing should permit, "and at such times and places and in such quantities as may be directed by [defendants]." The only other express requirement as to the time of commencement of plaintiff's work is that the "steel bucks for doors shall precede, and metal grounds for base and picture molding will immediately follow, the erection of the tile partitions."

Moreover, the defendants had not in terms promised that the building would be ready for plaintiff by October 1st. At the most they had said (on July 13th) that it would not be ready before September or October, with promise of further advice, and (on September 7th) in effect that it was expected that the steel erection would by the last of October have proceeded far enough to permit the commencement of plaintiff's installation. However, the suspension and other provisions just referred to gave defendants no right arbitrarily or unreasonably to suspend the work. And, as the case shaped itself, the controlling question on this branch of the case is whether the court rightly held, as matter of law, that, under the circumstances mentioned, a delay by which plaintiff would be prevented from beginning work until December or later was an unreasonable delay, which would justify plaintiff in canceling the contract. If so, we are not prepared to say that the notice was invalid because stating, as ground for rescission, that there had been no extension of time for completion beyond October 1st.

We think that, upon this record, the peremptory instruction as to unreasonable delay was erroneous. It is the general rule that questions of reasonable time and reasonable delay are for the jury. The only exception is where the facts are not in dispute and where there is no room for differing inferences. International Co. v. Stadler (C. C. A. 6) 212 Fed. 378, 382, 129 C. C. A. 54; Marmet Co. v. Peoples Co. (C. C. A. 6) 226 Fed. 646, 651, 141 C. C. A. 402. Such is not the case here. The evidence was not in complete harmony. There was testimony (considering it, as we must, most favorably to defendants) tending to show that plaintiff was kept acquainted with the progress of defendants' work and had the means of knowing with reasonable accuracy what the prospects were from time to time. Notwithstanding the delays, it was in frequent conference with defendants throughout the summer regarding the progress of the work. Its representatives visited Cleveland as often as once a month until October; one of them consulting with defendants about details left open by the contract, at least one of which details was never settled. These representatives were to that extent plaintiff's agents, and their knowledge and information thus acquired was that of plaintiff. G. R. & I. Ry. Co. v. United States (C. C. A. 6) 212 Fed. 577, 583, 129 C. C. A. 113.

After the letter of September 7th, which stated defendants' expectation that the work would by the last of October have progressed far enough for the beginning of plaintiff's installation, it kept on with its preparations without intimating any intention to discontinue. As late as September 22d it wrote defendants regarding proposed "extra" partitions. On September 18th to 22d plaintiff's engineer consulted with defendants at Cleveland regarding the details of plaintiff's work,

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reporting to plaintiff the results thereof, and on October 1st plaintiff wrote defendants referring to this visit of its engineer and confirming "certain information received and constructions decided upon" during the engineer's visit. The matters so formally confirmed included a checking of the quantities of certain openings, some of which were to be of special construction, "to be decided upon later by the architect," who had approved a schedule prepared for each of certain lower floor additions, accompanied by plaintiff's statement that "it is our understanding we are to proceed with this additional material," and asking to be immediately advised if its understanding was incorrect. Among other enumerations were special doors and their method of construction, with promise to "shortly send drawings of the sliding doors of this type in the basement for approval of sizes." It also asked whether a sketch which the architects were preparing of certain partition lights would "be ready shortly." There was also a request that the hardware schedule be promptly forwarded, with promise that the matter of finish "will be covered in a separate letter," and for the early submission of drawing for special closets. Reference was made to several other matters of a similar nature, followed by an express request for acknowledgment of the receipt of plaintiff's letter, "so that we may be sure all matters are understood between us."

It is because of the engineer's report of his visit referred to in the letter of October 1st, as to the then condition of the building, that the notice of rescission was given 15 days later. The letter of October 1st contained no reference to this subject, nor did plaintiff from the time of its engineer's visit in September until its cancellation letter of October 16th disclose to defendants any intention of rescinding the contract. After October 1st plaintiff wrote three letters, one acknowledging receipt from defendants of certain drawings, another asking for certain instructions from the architect, and the third to the hardware men, relative to certain doors and transoms. Plaintiff's fabrication of metal work continued up to October 16th, although the information conveyed in defendants' letter of July 13th, considered in connection with plaintiff's letter of August 30th, showed that plaintiff's installation could not be completed by October 1st. One item of the fabrication seems to have gone through the shops on October 29th.

What is reasonable time depends on a consideration of all the circumstances of the particular case. Without intimating any opinion upon the merits, and without setting out the testimony more at large or in detail, it seems enough to say that we think there was substantial evidence tending to support a conclusion that defendants were justified in relying upon an apparent intention on plaintiff's part to continue under the contract, and that a further delay of two or three months beyond October 1st would not be, under all the circumstances, unreasonable. The testimony thus presented a question of fact for the jury. The question whether plaintiff would have been entitled to damages for the delay, had it completed its contract, is not involved.

2. It follows from what we have said that the defenses of waiver and estoppel should have been submitted under appropriate instruc-

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tions, and that, if the jury should determine that plaintiff was not entitled to rescind, the subject of counterclaim would remain in the case.

The judgment of the District Court is reversed, and the record remanded, with directions to award a new trial.

(257 Fed. 911)

HEROLD et al. v. HEROLD CHINA & POTTERY CO.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1919.)

No. 3155.

1. INJUNCTION ⟸56—RIGHTS PROTECTED—SECRET FORMULAS AND PROCESSES.
Secret formulas and processes are property rights, which will be protected by injunction, not only as against those who attempt to disclose or use them in violation of confidential relations or contracts, express or implied, but against those participating in the attempt with knowledge of such relations or contracts, though they might in time have reached the same result by independent efforts.

2. INJUNCTION ⟸128—DISCLOSURE OF TRADE SECRETS AND PROCESSES—EVIDENCE.
In suit by a pottery company to enjoin use of its trade secrets and processes by defendants, its former manager and a competing company, evidence as to disclosure of trade secrets and processes by the manager *held* insufficient to sustain decree for plaintiff; there having been no disclosure in evidence of what each party claimed as a trade secret.

Appeal from the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by the Herold China & Pottery Company against John J. Herold and the Guernsey Earthenware Company. From a decree for plaintiff, defendants appeal. Reversed, except so far as enjoining defendant company in a certain particular.

Charles Koonce, Jr., of Youngstown, Ohio, and Fred L. Rosemond, of Cambridge, Ohio, for appellants.

Ezra Keeler, of Denver, Colo., for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and COCHRAN, District Judge.

KNAPPEN, Circuit Judge. Appeal from a decree enjoining the disclosure or use of alleged secret formulas, and for an accounting.

Herold, a skilled potter of ten or more years' experience in Ohio, went to Colorado in the year 1909, on account of a tubercular affection, and there erected a small factory for making high-grade chinaware. He lacked capital, and after about three years' effort turned over his entire plant and formulas to the plaintiff company, in consideration of his employment and certain stock to be given him. It was at first thought that but little capital would be required, but the requirements increased from time to time until about $47,000 had been contributed by the Golden parties by way of stock subscriptions and $26,000 in the form of loans. In 1914 the Golden product had acquired a high reputation. Professor Fleck, of the Colorado School of Mines, located

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at Golden, had found its chemical or laboratory ware equal to Royal Berlin ware, and had substituted the former for the latter. It seems to have been recognized, so far as it was known, as the highest grade of porcelain ware commercially made in America, and Herold as the expert maker of it.

The Guernsey Company had a large plant at Cambridge, Ohio, and was a wealthy and prosperous concern. It had successfully made high-fired china, especially that used for baking, such as casseroles, in which a red or brown body is lined with porcelain; the entire dish being then covered within and without with a glaze. It had also been for some time actively experimenting with white china and laboratory porcelain bodies, and had made some samples. It was perhaps close to the line of success, but seems not to have crossed it, at least so far as commercial production is concerned. In December, 1914, it employed one Frauenfelter, before then employed in a pottery at Roseville, Ohio. Frauenfelter seems to have recommended the employment of Herold, with whom Frauenfelter had been associated at Roseville before Herold went to Colorado. Herold had become dissatisfied with his relations with the plaintiff company; and, after finding that his resignation as general manager was satisfactory to plaintiff, and being given the position merely of modeler, designer, and decorator, although at the same salary, he in December, 1914, came to the Guernsey Company as factory superintendent, in complete charge of manufacturing, but without impairing the authority of the general manager. At the end of five years' performance Herold was to have 20 shares of the Guernsey Company's common stock, dividends thereon to be meanwhile paid him in addition to his salary, which was 60 per cent. larger than paid by plaintiff. There came with, or followed, Herold from Golden two or more of plaintiff's other skilled employés. Herold stayed with the Guernsey Company until the following May, when he retired and went to a pottery at Zanesville, Ohio, where Frauenfelter also went. On retiring, he conveyed to the Guernsey Company, for an expressed new consideration of $500, a so-called "Semmler" formula for making porcelain ware, which defendants claim Frauenfelter had obtained from one Semmler, of Derry, Pa., and had given to Herold while the latter was in the Guernsey Company's employ.

This suit was begun January 27, 1915. It was heard, not only on depositions taken in different parts of the United States, but on oral testimony consuming five days. The prominent issues were, first, whether the secret formulas and processes used at Golden belonged exclusively to plaintiff, and thus could not be lawfully disclosed by Herold; and, second, whether such disclosure had been made. The District Court found in favor of plaintiff on both propositions, and permanently enjoined defendants from disclosing or using "the whole or any part of the formulæ for manufacturing and producing either fireproof china cooking ware, or fireproof china or porcelain laboratory ware, or any knowledge or information relating thereto or connected therewith belonging to plaintiff, and which was developed and perfected by said Herold and became the property of and was used by the plaintiff." The injunction also ran against the use of the "Semmler

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formula in the form in which it was when communicated, surrendered, and delivered by said Herold to * * * the Guernsey Earthenware Company, and as it has since been perfected and improved upon, and as it existed at any stage when it was being tested and adapted by said Herold," as well as against making and selling "any fireproof china cooking ware or fireproof china or porcelain laboratory ware manufactured and produced by plaintiff from said Semmler formula, or any of the formulæ, so owned or used by the plaintiff"; also from representing or advertising that the Guernsey Company was making the same fireproof cooking and porcelain laboratory ware as made by plaintiff.

[1] 1. Plaintiff's secretary testified that, as part of the contract whereby Herold's plant was turned over to plaintiff, the former agreed to give to the latter, as its exclusive property, all his secret processes and formulas obtained by previous experimentation, as well as those he might thereafter discover while with plaintiff company. This testimony was taken in open court. There was other testimony more or less corroborative. The secretary also testified that in the month preceding Herold's employment by the Guernsey Company he informed that company's manager, Mr. Casey, of Herold's relations to plaintiff and the acquisition by the latter of Herold's secret processes and formulas. This testimony was doubtless believed by the District Judge, and we see no reason to question his conclusion on this feature of the case. A contract for plaintiff's exclusive ownership of the formulas and processes was, under the existing circumstance, not unnatural.

The rule is well settled that secret formulas and processes, such as are claimed to be involved here, are property rights which will be protected by injunction, not only as against those who attempt to disclose or use them in violation of confidential relations or contracts express or implied, but as against those who are participating in such attempt with knowledge of such confidential relations or contract, though they might in time have reached the same result by their own independent experiments or efforts. The following are among the leading cases supporting this rule: Morrison v. Moat, 9 Hare, 241; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; O. & W. Thum Co. v. Tloczynski, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469, and cases there cited; Eastman Co. v. Reichenbach (Sup.) 20 N. Y. Supp. 110; Stone v. Grasselli Co., 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 103 Am. St. Rep. 794, and citations therein; Macbeth Co. v. Schnelbach, 239 Pa. 76, 86 Atl. 688. And see Pomeroy Ink Co. v. Pomeroy, 77 N. J. Eq. 293, 298, 299, 78 Atl. 698. We think the case made falls within the principle just stated. It follows that Herold had no right to disclose to the Guernsey Company the secret formulas and processes covered by the contract, and that, if he did make or threaten to make such disclosure, plaintiff was entitled to relief with respect thereto.

[2] 2. The question of disclosure presents greater difficulty. The circumstances immediately attending Herold's employment by the Guernsey Company strongly suggest such disclosure. Immediately upon his employment by that company, Herold was advertised as a

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great find, a man with a national reputation as a ceramist. Simultaneously one of plaintiff's most important customers, which had given plaintiff a large order for porcelain ware, was applied to by the Guernsey Company for orders for the same kind of ware, and, on being told that it would be time enough to give orders when the Guernsey Company's samples were approved, replied that there was no question about production, that "Herold knows regarding costs and is familiar with the details of manufacture." Plaintiff accordingly lost the order. Plaintiff would seem to have been justified at the time it filed its bill in believing that Herold, who was by that time entirely out of harmony with, if not positively antagonistic to, plaintiff, had disclosed or was about to disclose its manufacturing secrets.

It developed on the trial that in his contract of employment with the Guernsey Company Herold had agreed to "constantly endeavor to improve the product and enlarge the variety of product in accordance with the policy of the company," and upon request, from time to time, to "communicate and demonstrate the formulas for any or all ware made in said factory, or known to or discovered or originated by him that may be available for said company, and keep a written record of all such formulas, and that such formulas and record [to] be a part of said company's private and secret record, and shall belong to said company only, and shall be kept secret from all others." As the factory referred to is evidently that of the defendant company, the agreement does not necessarily in terms call for a disclosure of the Golden formulas.

In the early summer of 1915 the Guernsey Company put on the market a line of porcelain ware of practically the same quality as plaintiff's. While there was no direct testimony of actual disclosure by Herold of plaintiff's secret processes and formulas, plaintiff's manager (Mr. Coors, Jr.), who succeeded Herold, and who had worked with the latter several months before Herold left plaintiff company, testified (by deposition taken out of court) to the existence of such formulas and processes, his knowledge of them derived from Herold, and that they related generally to the physical properties of the ingredients and the method of their preparation, the manner of applying the glaze to the pot, and the temperature in the firing kiln as relating to the composition of the body; also that the formulas, so far as written out by Herold, related only to the "percentage of the different sorts of clay that went into a given mix"; that the cards written out by Herold contained none of the secret processes, which, as again defined, were said to consist of "secret knowledge acquired by experience"—"methods and peculiarities which a man finds from time to time in the development." Further than this plaintiff refused to give or permit to be given any information of its claimed secret processes and formulas for which it asked protection. The witness further testified that, while all clays have different physical properties, the Golden process could be successfully used with the Ohio clays; that ware having the peculiar fireproof qualities of plaintiff's ware had not [before] been produced, and that the product ultimately put out by the Guernsey Company is identical in nature with plaintiff's latest product. There was other tes-

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timony more or less corroborative of this testimony in some respects. If it be completely accepted, the court below was justified in giving plaintiff some measure of relief.

On the other hand, the testimony of nonuse and nondisclosure of plaintiff's alleged secret processes and formulas was overwhelming, if believed. Casey, the manager and principal owner of the Guernsey Company, is apparently a man of standing and affairs, as well as an expert potter of many years practical experience, a member of the American Ceramic Society and apparently interested in its publications. His standing as an expert has been recognized by his employment as such before the Board of Customs Appraisers, his appearance as an expert witness for the government in litigation over classifications and values, appearances before the Treasury Department and congressional committees, as well as consultation and working with government experts on development of pottery manufacture. He testified positively that he had never obtained any of plaintiff's claimed secrets from Herold or from any one else; that he never knew that Herold had or claimed to have secret processes, nor what plaintiff claimed its formulas or processes were; that he wished Herold's services as a superintendent on account of his supposed expertness a a potter; that Casey himself already had two formulas each for bodies and glazes, as well as a porcelain formula obtained from one Myers on August 28, 1914, from which latter formula satisfactory samples had already been made (porcelain seems not to have been produced by Myers commercially); that there are no secrets in pottery, except the formulas; that under Herold no new methods of manufacture were employed; and that both he and Herold worked in experimenting in the manufacture of porcelain. He claims to have in September, 1914, completed a costly addition to the plant, partly for the manufacture of porcelain laboratory ware, and to have exhibited to the trade samples of such ware in November following.

Herold, who, as before said, was a skillful ceramist, testified that there were at Golden no secret processes, as distinguished from formulas, unless as he perhaps may have meant that the secret processes involved merely mechanical skill and experience; that he used at the Guernsey Company no secret processes used at Golden; that the Golden secret related, not to the clay, but to an acid used in its treatment, and that the formula was in this respect secret so far as the Colorado clay was concerned; that the Colorado and Ohio clays were quite different; that no Colorado clay was used by the Guernsey Company; that at Golden there were used but two clays, together with a flint and a spar and one chemical; that at Guernsey there were used five clays, also a flint and a spar and two chemicals; and that the acid used at Golden could not be used at Guernsey, because it had the opposite effect on the Eastern clays.

Frauenfelter also testified that there were no secret processes in pottery, as distinguished from formulas; that the making of porcelain was practically a matter of experimentation; that the Semmler formula, which he claims to have obtained about November 15, 1914, and to have given to Herold in the latter part of the following January, was

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a percentage formula of clays, feldspar, and flint, "given out in batch weights"; that he afterwards found that the Semmler formula was not secret, because "published in several works." He seemed willing to give the substance of the Semmler formula if desired; but plaintiff did not seem to desire it, possibly through fear it might by implication disclose plaintiff's formulas.

Brucker, Herold's brother-in-law, who had been with the latter at plaintiff's plant, and who went with him to the Guernsey Company, testified that the Golden formula covered the secrets at plaintiff's plant and related to the amounts of materials that went into the bodies and glazes and their mixing (to this extent partially corroborating plaintiff's present manager); that he did not know the chemical constituents of the ingredients used at either the Golden or the Guernsey plants, but that the "mixes" were not the same in the two plants; that at the Guernsey plant he knew the materials, but not the amounts, and at the Golden plant knew both materials and amounts; that at Golden there were but two clays, a flint and a spar, besides water and another chemical; and that at the Guernsey plant there were used five clays, a flint and a spar, water, and another chemical. (Of course, the mere fact that a change was made in the original formula, due to differences in clay available, would not necessarily prove that the Golden formulas or secret processes were not used.) He further testified that the Golden formula was changed by eliminating the acid after Herold left. (This latter statement seems not to have been denied, possibly through apprehension that denial would lead to a disclosure of the actual formula or process.) It further appeared by defendant's testimony that the perfection of the Guernsey Company's porcelain after Herold's acquisition was the result of long experimentation; 27 or more different experiments being tried by Herold before even approximately satisfactory results were obtained. This was perhaps due largely to differences in the clay available at Golden and at Cambridge respectively, to the differences in fuel used (coal at Golden, gas at Cambridge), and in the difference in atmospheric rarity at the respective places, due to altitude, and materially affecting the firing. There seems, also, to have been other difficulties in the way. The result was, according to defendant's testimony, that Herold had not succeeded in putting out porcelain for the Guernsey Company with complete commercial success. It appears, on the contrary, that kilns which under later operation netted $1,700 to $2,000, under Herold's operation netted but $300 to $400 each. In May, 1915, after about five months' service (perhaps four months after the injunction bill in this cause was filed), Herold severed his connection with the Guernsey Company, as did Frauenfelter. The Guernsey Company's first commercial porcelain was put out shortly after Herold left.

Manifestly the decree of the District Court entirely discredits the testimony of Casey, Herold, and Frauenfelter. Had the testimony of plaintiff's present manager been taken in open court,[1] and had both

[1] The witness testified very briefly on the hearing by way of rebuttal, as to a few items not important to our decision.

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parties made full disclosure satisfactory to the trial court, of what plaintiff's claimed secret processes and formulas actually were, as well as the process employed by defendant (which the latter offered to disclose, provided plaintiff would disclose its own), we should probably be satisfied to adopt the conclusions of the District Judge, with possibly some modification. But the printed record of the testimony of the witness referred to is not entirely convincing, and the sharp conflict over the nature and extent of plaintiff's secret formulas and processes, and their comparison with defendant's methods—taking into account defendant's previous nearness to success and the competency of its manager, Casey, and the formulas already possessed—made disclosure thereof necessary, in our opinion, to a satisfactory decision. Without it the decree rests, we think, too largely on conjecture. The practical identity of ultimate product is not alone highly significant, inasmuch as even chemical analysis would not disclose either the original physical form of the ingredients used or the processes employed. We may add that no Colorado clay was used at the Guernsey plant as an ingredient of porcelain or china; that in modern porcelain manufacture generally clay, feldspar (one of the silicates of aluminium), and flint (silica) seem to be used; that different clays have different physical properties, which naturally affect the chemical combination; that the method of combining ingredients used so as to produce a satisfactory "mix" is an important problem; and that without knowing the process actually used it is impossible to know definitely how far they involve secret knowledge or information, as distinguished from mechanical skill and experience, as respects not only the "mix" but the glazing and firing.

The practice of making such disclosure in camera is well established. Taylor Co. v. Nichols, 73 N. J. Eq. 684, 689, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753. And disclosure can usually be made under such regulations on the part of the trial judge as will furnish reasonably adequate protection against publicity. Du Pont Powder Co. v. Masland, 244 U. S. 100, 37 Sup. Ct. 575, 61 L. Ed. 1016. Judge Sater recognized that "it would have been better, had there been a voluntary or compulsory disclosure in camera of what each party claims as a trade secret." We do not criticize plaintiff's unwillingness to have its formulas disclosed. It may have good reason to prefer the risk to its business from nondisclosure to the risk from disclosure. We base our action on the proposition that failure to make disclosure naturally impairs the weight of the testimony of plaintiff's manager; and in the absence of disclosure, especially in view of the limited acquaintance of the witness with pottery manufacturing processes before Herold left plaintiff's employ, we think the decree should not stand, except in one respect hereafter stated. Taylor Co. v. Nichols, supra; Baglin v. Cusenier (C. C. A. 2), 164 Fed. 25, 29, 90 C. C. A. 499. And see Sterling Varnish Co. v. Macon, 217 Pa. 7, 9, 66 Atl. 78.

We realize, however, that if plaintiff's claims are correct the equities are with it, and we shall therefore couple our reversal with a discretionary authority to the District Judge to entertain a motion on plaintiff's part (if such shall be made) for further hearing and the in-

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troduction of further testimony on both sides, provided the application is accompanied by express offer to make and permit full disclosure (of course, in camera) of its alleged secret formulas and processes. We make this proviso because we realize that plaintiff may see nothing to be gained, at this stage of the case, by such disclosure. Defendant having offered below to disclose its processes and formulas (in camera), if plaintiff would do the same, and having obtained a reversal of the decree for want of such disclosure, could not well be heard to withdraw its consent.

This disposition makes it unnecessary to consider criticisms upon specific features of the decree, such as the running of the injunction against the use of the Semmler formula, the disclosure or use (as construed by defendant) of Herold's mechanical skill and experience, or the failure to identify the processes and formulas enjoined. If no rehearing is had, they are not important; if had, the grounds of criticism may be removed.

The decree of the District Court is reversed, with costs, except so far as it enjoins the Guernsey Company from representing or advertising that it is making the same fireproof china cooking ware or fireproof china or porcelain laboratory ware as is made by plaintiff.

(257 Fed. 918)

HOWARD v. LEETE et al.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3143.

1. APPEAL AND ERROR ⟸334(3)—WRIT OF ERROR TAKEN BY TRUSTEE—ABATEMENT BY DEATH.
   Writ of error taken out by plaintiff, "D. R. Howard, trustee," *held* not taken by him as sole trustee so as to have been abated by his death, and not to be revived in the name of his personal administrator.

2. JUDGMENT ⟸531—JUDGMENT AGAINST TRUSTEE—PERSONAL LIABILITY.
   Where the decree did not run against plaintiff trustee in a representative capacity, he being styled therein "D. R. Howard, trustee," prima facie indicating the word "trustee" was merely descriptive, while the order for execution was directed against "D. R. Howard, trustee," he was personally liable.

3. EQUITY ⟸39(4)—RELIEF—JUDGMENT ON NOTES SOUGHT TO BE CANCELED—JURISDICTION.
   In suit by trustee to cancel promissory notes given for coal-mining property, and for relief from liability thereon, the District Court had jurisdiction, on finding for defendant holders of the notes, to render judgment against plaintiff trustee on the holders' counterclaim on the notes, since equity will retain jurisdiction of subject-matter properly acquired to do complete justice, though it involves determination of legal rights.

4. COURTS ⟸311—FEDERAL COURT—DIVERSITY OF CITIZENSHIP.
   District Court sitting in Kentucky *held* vested with jurisdiction over plaintiff, a trustee, and a citizen and resident of Ohio, suing to cancel notes given for the purchase price of coal-mining property, on the cross-suit of defendants, the holders of such notes, residing in and citizens of Virginia, to recover thereon against plaintiff trustee.

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5. COURTS ⇐332—POWER OF SUPREME COURT—GENERAL EQUITY RULE.
The Supreme Court of the United States has power to confer by general equity rule No. 30 (118 C. C. A. v, 201 Fed. v) a right to relief on counterclaim which the trial court has undoubted power to give on actual hearing, and which it is its settled practice to give without its being affirmatively asked for.

6. COURTS ⇐347—EQUITY RULE—COUNTERCLAIM—SUIT TO CANCEL NOTES.
In view of the policy disclosed by general equity rules Nos. 22, 23 (115 C. C. A. xxiv, 198 Fed. xxiv), under No. 30 (118 C. C. A. v, 201 Fed. v), as to counterclaims, the District Court had jurisdiction to entertain defendant holders' counterclaim on the notes sought to be canceled in suit by plaintiff trustee, the purchaser of mining property, to rescind the purchase and cancel the purchase-money notes.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit in equity by D. R. Howard, trustee, against R. H. Leete, Gallie Friend, individually and as trustee, and others. From a decree for Gallie Friend, as trustee, against plaintiff, the latter appeals. Affirmed.

Frank W. Cottle, of Cincinnati, Ohio, for appellant.

John F. Hager, of Ashland, Ky., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On September 26, 1914, appellant purchased from the Mary Luck Coal Company its coal mine and mining properties, real and personal, at the price of $31,500, for which he gave, to the order of the coal company, his 21 negotiable promissory notes, each for $1,500, with interest, to secure which a vendor's lien was retained in the deed of conveyance of the coal properties. The coal company was to pay all its debts existing as of October 1, 1914. By agreement between appellant and the other interested parties, at least 9 of the notes were delivered to Gallie Friend, as trustee, to secure payment of indebtedness of the coal company. The latter's stockholders were to receive nothing on account of any of the notes until the company's debts were paid. Later certain of the company's creditors took proceedings in a state court of Kentucky for the appointment of a receiver over the coal properties, and for their subjection to the payment of asserted indebtedness.

Thereupon appellant filed his bill in the court below, alleging his purchase of the properties, their conveyance to him, and his consequent possession of the same, and asserting that the receivership suit resulted from the refusal of Friend, trustee, to apply the 9 notes in question, or their proceeds, to the payment of the company's indebtedness, averring appellant's readiness and willingness to pay into court the remainder of the purchase price as it became due, and asking for decree requiring the defendants (all of the individuals being stockholders of the coal company) to interplead for the settlement of their conflicting claims to the purchase money represented by appellant's notes, and for restraint meanwhile of the receivership proceeding.

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Gallie Friend, individually and as trustee, and one other stockholder, answered, admitting the purchase by appellant on the terms stated, the conveyance to him of the coal properties, his possession thereunder, the coal company's agreement to pay its debts existing as of October 1, 1914, and the delivery to Friend, trustee, of the nine notes to secure such payment, but denying that the receivership proceedings were instituted on account of debts which it was the duty of the coal company to pay, or by reason of any failure of Friend, trustee, to perform his obligations, and asserting that appellant had already defaulted in the payment of about $6,000 of notes so far matured, and was attempting to induce the discounting of his notes at about 50 per cent. of their face value.

By counterclaim it was asked that appellant be required to pay into the court's registry the amount of his matured notes, that his bill be thereupon dismissed, and in default of such payment, or of payment of his notes subsequently maturing, that judgment be entered in the trustee's favor, and for disclosure by appellant of the names of those beneficially interested in his trust. The counterclaim also asked that the coal company's indebtedness be held to be in the amount asserted by defendants, unless appellant put such question in issue. Upon the maturing of further notes, an amended answer and counterclaim of the same nature were filed as to them. This counterclaim was followed by motion for judgment thereon. Appellant's motion to strike out the answers and counterclaims was denied. The other defendants seem not to have answered.

A few days after the filing of this bill, suit by another creditor was brought against the coal company in the Kentucky state court. As the result of these two creditors' suits (both for royalties under leases), the coal properties in question passed into the hands of a receiver appointed by that court on February 25, 1915, about a month after the filing of appellant's bill below. On June 13th following, appellant made and had recorded a deed of reconveyance of the coal properties from himself to the coal company. The coal properties were sold under the state court receivership proceedings to satisfy judgments against the coal company in the two cases named, at an unnamed date between July 13, 1915, and May 20, 1916, at which date appellant filed in the court below a new bill, in declared nature supplemental to the original bill, averring the receivership proceedings just mentioned, the possession of the coal properties thereunder and the making and recording of the reconveyance referred to; and asking that the contract of purchase and sale of the coal properties be canceled and that the 19 unpaid notes (2 notes had been paid) be delivered into court, canceled, and destroyed, upon grounds which, so far as material, we summarize as follows:

First, that appellant was induced to take the conveyance of the coal properties by certain material misrepresentations as to their character, quantity, and value, made by the defendant B. P. Friend, the secretary and former manager of the coal company, while acting, as alleged, for the coal company and under authority from the other defendants to negotiate the sale on their behalf; that by the agreement with said Friend appellant was to and did hold the legal title to such property as

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trustee, and as such was to convey the same under such terms and conditions, at such price above $31,500, and to such persons or corporation, as Friend should direct; appellant to pay to Friend, or under his direction, the proceeds of such resale, less expenses of operation, the balance, if any, due on the notes (which he alleged were made by him as such trustee), and reasonable compensation to appellant for his services as trustee; second, the company's agreement to pay all its debts existing on October 1, 1914, and representation by defendants Gallie Friend and another stockholder that such debts were small; third, the transfer and indorsement to Gallie Friend, trustee, for the purpose before stated, of appellant's 21 notes, in accordance with resolution of the company's directors; fourth, the carrying on of the business of the coal company after October 1, 1914, in the company's name and under the direction and management of B. P. Friend, and the payment from the proceeds of operation of the first two maturing of appellant's notes; and, fifth, the sale of the coal properties for liabilities of the company existing October 1, 1914.

The contract of purchase and sale was alleged to be broken by defendants' breach of their agreement to pay all liabilities of the company existing on or before October 1, 1914, and of their covenant to deliver possession of the properties free from liens or obligations of the company as of that date.

The defendants, other than B. P. Friend, answered, fully controverting all equities and merits alleged in the bill; denying generally and specifically all fraud and misrepresentation charged on their part, or that of the coal company, or on the part of B. P. Friend, so far as they had information and belief, specifically denying that the latter represented the company or its stockholders, other than himself, in the negotiations for the sale of the property, or that he made any misrepresentations while acting in such representative capacity; denying all knowledge and information of the alleged agreement relative to the nature of plaintiff's holding of the properties, and his agreement to sell and convey as directed by B. P. Friend, or of any agreement not embraced in the coal company's deed of conveyance to plaintiff; alleging unsuccessful attempts to induce plaintiff to pay his notes; denying any right on his part to rescind the contract of purchase; alleging that the execution sale was due entirely to his own fault, in his deliberate election not to pay royalties after October 1st. Defendants also asserted that plaintiff, in his holding of the properties, was a mere dummy for certain others, not parties to the suit, who were alleged to have full knowledge of all the existing facts and equities. There was prayer for affirmative relief substantially as contained in the answer and counterclaim to plaintiff's original bill.

Plaintiff's renewed motion to strike out the counterclaims was denied. His motion to dismiss his own bill without prejudice was granted, but without prejudice to the maintaining of the counterclaims. Plaintiff having failed to deny or reply to the answers and counterclaims, and it appearing that plaintiff had not paid the 19 notes in question, in whole or in part, there was interlocutory decree fixing the amount due thereon, with award of personal judgment in defendants'

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favor, unless plaintiff should pay the amount into the registry of the court within a specified period. Plaintiff having failed to make payment, judgment was entered in favor of Gallie Friend, as trustee, against the plaintiff, for the amount so due and unpaid on the notes in question.

[1, 2] 1. The motion of appellees to dismiss the writ of error (which, under the act of September 6, 1916, we treat as an appeal), on the ground that it was taken by "D. R. Howard, as sole trustee," and so was abated by his death, and cannot be revived in the name of his personal administrator, must be denied. The notes were signed by "D. R. Howard, trustee," and the conveyance apparently ran to appellant under that designation, and without disclosure of his principal, if any. The decree below did not run against appellant in a representative capacity. He is styled therein "D. R. Howard, trustee," which prima facie indicates that the word "trustee' is merely descriptive. Moreover, the order for execution, while in favor of Gallie Friend "*as* trustee," is directed against "D. R. Howard, trustee," and the execution itself demands the collection of the judgment "from the estate of D. R. Howard, trustee," who was then still living. Under the applicable law appellant was personally liable upon the judgment. See Carroll's Ky. Stat. 1915, vol. 3, § 3720b, subsec. 20; Riordan v. Thornsbury, 178 Ky. 324, 198 S. W. 920; Taylor v. Davis, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163. The writ of error was taken out by "D. R. Howard, trustee," and the suit was thus properly revived in the name of his personal representative.

[3] 2. Appellant denies the jurisdiction of the District Court to render judgment against him upon the counterclaim, because (a) defendants' cause of action was not the subject of counterclaim, and (b) the court below, sitting in Kentucky, had no jurisdiction over appellant, a citizen and resident of Ohio, at the suit of appellees, residing in and citizens of Virginia.

We see no merit in this contention. We assume, for the purposes of this case, that such judgment could not be rendered in a purely interpleader suit, where the plaintiff was merely seeking to pay a fund into court and to compel claimants thereto to litigate as between themselves a controversy with which he had no concern. Wakeman v. Kingsland, 46 N. J. Eq. 113, 18 Atl. 680. In such case the sole primary issue would be whether plaintiff was entitled to a decree that defendants interplead. If so, he would step out; if not, his bill would be dismissed. But such was not the situation at least under the new bill, which we identify as "supplemental," and by which, on a complete change of front, appellant sought cancellation of his notes and relief from all liability thereon. The sole ultimate issue, then, was whether or not he was bound to pay his notes. If so, it logically followed that their holders were entitled in some proceeding to enforce their payment. Long before the adoption of general equity rule No. 30 (201 Fed. v, 118 C. C. A. v), it was the established rule that a court of equity, which has properly acquired jurisdiction of the subject-matter for a necessary purpose, ordinarily should, for the purpose of putting an end to litigation, proceed to do final and complete justice between the parties,

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even though this required it to determine purely legal rights that otherwise would not be within the range of its authority—provided such relief could as well be given there as by a proceeding at law. Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 404, 13 L. Ed. 187; Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298; Camp v. Boyd, 229 U. S. 530, 552, 33 Sup. Ct. 785, 57 L. Ed. 1317; Springfield Co. v. Barnard Co. (C. C. A. 8) 81 Fed. 261, 263–265, 26 C. C. A. 389.

The principles declared in these cases apply to the case before us. In Tayloe v. Insurance Co., under a bill in equity involving the establishment of a contract of fire insurance, the plaintiff was awarded recovery for the fire loss occurring after the contract was found to have been completed. Eames v. Insurance Co. is of a similar nature. In Camp v. Boyd, where suit was brought to restrain an ejectment suit, it was said (229 U. S. 551, 33 Sup. Ct. 793, 57 L. Ed. 1317) that the appellees therein, if driven to invoke the aid of equity because they had an equitable and not a legal title to two of the three parcels involved, "were fairly entitled to bring the entire controversy into the court of equity, so that it might be adjudicated in a single suit." Neither of these cases involved the question of counterclaim. In Springfield Co. v. Barnard Co. the defendant to a bill for the foreclosure of a mechanic's lien was held entitled to maintain cross-bill for damages to its mill, which ordinarily would be the subject of an action at law. Further illustrations of the general rule are found in Pease v. Rathbun-Jones Co., 243 U. S. 273, 279, 37 Sup. Ct. 283, 61 L. Ed. 715, Ann. Cas. 1918C, 1147, and Cincinnati, etc., Traction Co. v. Amer. Bridge Co. (C. C. A. 6) 202 Fed. 184, 186, 120 C. C. A. 398.

Insurance Co. v. Dick, 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846, and New Era Association v. MacTavish, 133 Mich. 68, 94 N. W. 599, are directly in point upon the broad principle that a court of equity has power to decree payment of a debt under circumstances involved here. In those cases the insurers filed bills in equity to cancel policies of life insurance for alleged fraud in their procurement, and to restrain actions at law thereon. Defendants, by answer, asked judgment upon the policies under a state practice which permitted a defendant to claim by answer the benefit of cross-bill whenever, by established chancery practice, a cross-bill would lie; the usual equity practice otherwise prevailing and the distinction between law and equity being sharply defined. Fraud not being established, the defendants had decrees for the amounts of the policies apparently as matter of course, and doubtless by the simple application of the rule that a court of equity "will not do justice by halves." In the instant case there is no room for doubt that, had the case gone to final hearing upon the supplemental bill, and had the court then held that appellant was not entitled to rescind or to have his notes canceled, it could and should have rendered judgment for repayment to parties before the court shown to be entitled thereto. Under such circumstances, to have remitted the defendants to another suit would have been an idle ceremony.

[4] That the court had jurisdiction over the parties is equally plain. It is a mistake to say that this jurisdiction was acquired merely because the original action was local. Embracing, as it did, the right to rescind

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a purchase of real estate, the action was, even under the supplemental bill, a local action in a proper enough sense, whether or not the second bill was rightly labeled "supplemental." But there was all the time diversity of citizenship of the parties, and appellant could not be allowed to question a jurisdiction he had himself invoked. His inability to get the counterclaim to the original bill of interpleader dismissed did not alter the situation. The difficulty was that by that time he wished other and wholy inconsistent relief. The fact that he was not a resident of Kentucky, thus making suit at law against him in that state difficult, if not impracticable, would have furnished additional reason for the exercise of complete jurisdiction in the equity suit. Caflisch v. Humble (C. C. A. 6), 251 Fed. 1, 5, 163 C. C. A. 251. And see Springfield Co. v. Barnard Co., supra, 81 Fed. at pages 264 and 265, 26 C. C. A. 389.

[5, 6] Is the situation altered by the fact that plaintiff did not go to hearing on his bill? General equity rule No. 30 expressly provides that:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit on both the original and cross claims."

The second clause of this paragraph, which permits the pleading of "any set-off or counterclaim * * * which might be the subject of an independent suit in equity, * * *" has been the subject of differing constructions. But we are not concerned with this clause, for the appellees' demand for judgment against appellant on the notes is based upon the first clause. The term "counterclaim," as there used, is broad enough to embrace any counterdemand; that is to say, any demand directly opposed to plaintiff's demand. As used in the first clause, such "counterclaim" is not required to be capable of being "the subject of an independent suit in equity," but only that it be one "arising out of the transaction which is the subject-matter of the suit." To our minds there can be no doubt of the power of the Supreme Court to confer upon a defendant, by general rule, a right to relief which the court has undoubted power to give on actual hearing, and which, indeed, it is its settled practice to give without its being affirmatively asked for. See Boothe v. Armstrong, 76 Conn. 530, 57 Atl. 173.

Nothing could be more directly opposed to plaintiff's demand for the cancellation of his notes than defendants' demand for judgment thereon. That the latter demand arose "out of the transaction which is the subject-matter of the suit" needs no argument; and, as already said, ultimate judgment on the notes was the natural and logical outcome of a refusal to cancel them. A construction of the first clause as relating only to demands "which might be the subject of an independent suit in equity" cannot be accepted. To do so would not only require the interpolation bodily of a clause in terms made applicable only

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to the second branch of the rule, but would ignore the existing equity practice. The object of the rule was to simplify and extend, not to curtail, an existing practice designed to prevent multiplicity of suits.

The cases of Caflisch v. Humble, supra, and Knupp v. Bell (C. C. A. 4) 243 Fed. 157, 156 C. C. A. 23, are in point. In the Caflisch Case we held that the defendant's claim for damages for breach of a contract of purchase and sale of lumber, on account of which plaintiff was seeking to establish an equitable lien, was a counterclaim arising out of the transaction which was the subject-matter of the suit, and, indeed, one which the defendant was obliged to set up or waive. True, such demand for damages might be said to be germane to the accounting and so of an equitable nature, but the decision invoked the proposition that, "whenever practicable to do so, a court of justice should do justice completely and not by halves." Knupp v. Bell, however, is on all fours with the instant case. There, in a suit to rescind a contract for the purchase of land, judgment for defendants (the vendors) for the amount of the purchase-money notes (on denial of relief to plaintiff) was affirmed, as on a "counterclaim arising out of the transaction which is the subject-matter of the suit"; doubt being also expressed whether defendants would not have waived such right of recovery, had it not been set up in the answer.

In the instant case we are not called upon to decide whether, in view of the word "must" in the first clause, as distinguished from the word "may" in the second clause, appellees by failing to ask judgment on the notes would have lost the right to sue upon them elsewhere, after a decision in the equity suit denying appellant any relief; for it is clear that the words "and such * * * counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims," apply to "any counterclaim arising out of the transaction which is the subject-matter of the suit"; and we think that to deny to appellees at least the absolute right to present in the equity suit their claim to affirmative relief would violate the spirit and intent of the rule, construed in the light of the policy disclosed by rules 22 and 23 (198 Fed. xxiv, 115 C. C. A. xxiv), as well as by recent legislation designed to simplify practice.

It is not, and could not well be, urged that if appellees were entitled to make the counterclaim there was lack of jurisdiction to render judgment against appellant in some amount. There was thus no error in refusing to dismiss the counterclaim to the second bill, and, as the case finally shaped itself, there was no reversible error, to say the least, in the like refusal as to the first bill.

3. The criticism that it does not appear that Gallie Friend, as trustee, owned or held more than 9 of plaintiff's notes is not, to our minds, well taken. The supplemental bill alleges, not only that by the terms of the contract all of the 21 notes *were to be* transferred to Friend as trustee for the stockholders, but that upon the delivery of the conveyance to appellant, on his execution of the 21 notes, "that same and all of them *were* duly indorsed and received by Gallie Friend as trustee, as aforesaid, to hold same in accordance with the resolutions above

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referred to." We find nothing in the answers which we think necessarily inconsistent with this allegation, so far as it concerns the right of Friend, *as trustee,* to be awarded recovery on the notes.

The decree of the District Court should be affirmed, with costs to appellees. But, while we see no reason to apprehend danger that appellant's estate will be twice subjected to double liability on any of the notes, yet, to eliminate possibility thereof, the affirmance will be with the proviso that the District Court take such action, by amendment of its decree or otherwise, as that the moneys paid or collected by virtue of the decree be paid into court, and thereafter paid out only to the extent that appellant's notes for which recovery has been had are duly surrendered to the registrar of the court, for delivery to appellant's representative or representatives, provided such action is not forbidden or made unnecessary by a state practice requiring the actual filing of the notes before judgment, as basis thereof, and an effective cancellation resulting from their merger in the judgment.

(257 Fed. 926)

CASCADEN v. BELL.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3226.

1. PLEADING ⊜367(2)—COMPLAINT—MOTION TO MAKE MORE DEFINITE.
   Where the matters involved were within defendant's knowledge, and after the opening statement of counsel defendant was granted a continuance, on the ground that matter had been brought out which was not anticipated, the denial of defendant's motion for plaintiff to make the complaint more definite and certain *held* not an abuse of discretion.
2. PLEADING ⊜367(6)—COMPLAINT—MOTION TO MAKE MORE DEFINITE AND CERTAIN.
   A motion to require plaintiff to make his complaint more definite and certain is addressed to the court's sound discretion.
3. FRAUDS, STATUTE OF ⊜49—AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR.
   Defendant's agreement that, if plaintiff would reduce the price of a mining claim in favor of the holder of an option to purchase, defendant would pay to plaintiff the amount of the reduction, as soon as the holder of the option paid a debt due to defendant, though oral, was not within the statute of frauds, as one not to be performed within a year, as payment might be made immediately.
4. FRAUDS, STATUTE OF ⊜33(2)—PROMISE TO ANSWER FOR DEBT OF ANOTHER.
   Where defendant, to protect his interest in a mining claim from relocation by the holder of an option to purchase plaintiff's claim, agreed that, if plaintiff would reduce the price, he would make up the same, such agreement, though oral, was not within the statute of frauds, for, whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary purpose of his own, the promise, though it may be in form a promise to pay the debt of another, is not within the statute.
5. EVIDENCE ⊜419(1), 461(1)—PAROL EVIDENCE RULE—RECEIPTS—CONSIDERATION—INTENT.
   Although plaintiff executed a receipt reciting payment of part of the consideration by the holder of an option to purchase a mining claim, parol

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evidence is admissible to show that the consideration named was not paid, but that he received a note or assignment from defendant and his oral promise to pay balance, and that the intention was to reduce the sum payable under the option.

6. APPEAL AND ERROR ⟸1054(1)—REVIEW—REVERSAL.

Where a case is tried by the court without a jury, the improper admission of evidence is no ground for reversal, where there was other evidence in the record sufficient to sustain the court's finding.

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Action by Albert Bell against D. H. Cascaden. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff, Bell, in an action to recover money from the defendant, Cascaden, set forth sufficient of the facts which were found by the court below to constitute a cause of action, but erroneously alleged that the payment received by him from the defendant was $500, instead of $1,000, and he demanded judgment for $4,500. A jury trial was waived, and the cause was tried before the court. As found by the trial court the facts are these:

On November 30, 1914, Cascaden and Sherry located the Leitrim association placer mining claim, under an agreement whereby Bell owned an equal interest with Cascaden and O'Connor owned an equal interest with Sherry. On December 16, 1914, Bell entered into a prospecting agreement with Cascaden for a period of one year, under which all properties acquired during that period were to be owned jointly by them. Thereafter, while that agreement was in effect, Bell, with the consent of Cascaden, staked the Totem fraction off the lower end of the Leitrim claim, they believing that the Leitrim claim contained an area in excess of 40 acres, and they became joint owners of said Totem fraction. Thereafter, on March 14, 1915, Bell entered into a written agreement with McCarty, whereby he granted to McCarty the exclusive right to purchase all his right, title, and interest in and to certain placer mining claims, including the one-half interest in the Totem, for the sum of $10,000, $200 of which was paid at that time, and the remainder was to be paid on or about October 1, 1916, and Bell attempted to include in that agreement an undivided one-fourth interest in the Leitrim claim, claiming to be the owner thereof, and Cascaden acknowledged to McCarty that Bell was entitled to a one-fourth interest in that claim, and that he would try to get it from Sherry, in whose name one-half interest of the claim then stood, and told McCarty that, if he did not get said one-fourth interest from Sherry, he (Cascaden) would make it good to him. After staking the Totem fraction, Bell failed to do the development work thereon, and, after the expiration of 90 days from the staking of the Totem, McCarty restaked it, retaining the name thereof, and thereafter performed the development work thereon as required by law. Bell and Cascaden attempted to do the development work on the Leitrim claim, but by a mistake did the work on an adjacent prior claim, which overlapped a portion of the Leitrim.

After the relocation of the Totem, McCarty relocated the remainder of the Leitrim claim. Thereafter O'Connor ascertained that the Totem fraction had been located off the lower end of the Leitrim, and that the Leitrim claim as originally staked did not contain an excess of 40 acres, and he protested to McCarty against the restaking of both claims. McCarty refused to surrender his rights unless the option price set forth by Bell in his agreement with him be reduced by $5,000. O'Connor communicated this to Cascaden. Immediately thereafter Cascaden told Bell of the relocation of the Leitrim claim by McCarty, and the protest made by O'Connor against the restaking of the Totem fraction, and told Bell that the only way in which the Leitrim could be saved would be for Bell to reduce his option price in his agreement with McCarty by $5,000, and also said that McCarty owed him (Cascaden) a large sum of money, in excess of $11,000, and that, if Bell would reduce his option price to McCarty by the sum of $5,000, he would pay

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Bell the sum of $5,000, that he would give him an order for $1,000, payable from the output of the Leitrim claim, and would pay him the remaining $4,000 as soon as he collected said money from McCarty, which would be paid by McCarty not later than the summer of 1916. In consideration of that promise Bell agreed to reduce by $5,000 the amount McCarty would be required to pay him under the option agreement, and Bell, in fulfillment of his agreement with Cascaden, on or about May 15, 1915, delivered to McCarty a formal receipt and release for the sum of $5,000, reciting that he had received said sum from McCarty; but no money was paid to him at that time, and said receipt was given for the purpose of releasing McCarty from obligation to pay Bell $5,000, and for no other reason.

Immediately after the delivery of the receipt to McCarty, and in fulfillment of his agreement with O'Connor, McCarty removed from the Leitrim claim the stakes of the Totem fraction, surrendered to Cascaden and his co-owners possession of the ground covered by the Totem, and abandoned all claim to any part of the Leitrim as originally staked. On or about May 17, 1917, Cascaden and O'Connor delivered to Bell an order for $1,000, payable out of the gold extracted from the Leitrim claim, and on May 26th following the assignment was typewritten in a more formal manner than the order, and was signed by Cascaden and Sherry, through his attorney in fact, and was accepted by Bell for the sum of $1,000 in part payment of the $5,000 to be paid by Cascaden to him. Thereafter Cascaden received payments from McCarty from time to time on account of the latter's indebtedness to him, and by the expiration of the summer of 1916 the indebtedness was fully paid.

Upon these findings the court found as conclusion of law that the plaintiff was entitled to a judgment against the defendant for the sum of $4,000, with interest from October 1, 1916, and costs.

Morton E. Stevens and A. R. Heilig, both of Fairbanks, Alaska, and Thomas R. White, of San Francisco, Cal., for plaintiff in error.

McGowan & Clark and Leroy Tozier, all of Fairbanks, Alaska (De Journel & De Journel, of San Francisco, Cal., of counsel), for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] In the complaint it was alleged that certain difficulties arose between McCarty and the defendant, and that for the purpose of settling and adjusting said difficulties the defendant applied to the plaintiff for the reduction of the option price in the plaintiff's agreement with McCarty by the sum of $5,000. The defendant moved that the plaintiff be required to make his complaint more definite and certain, and to set forth the nature of the difficulties between defendant and McCarty. The motion was denied, and that ruling is assigned as error. It is not shown, nor can it be deduced from anything in the record, that the denial of the motion prejudiced the defendant in any way. The difficulties which he had with McCarty were within his own knowledge, and it is not shown that he was taken by surprise by the evidence which was adduced. After the opening statements of counsel for the plaintiff, the defendant asked for a continuance on the ground that matter had been brought out that had not been anticipated, and he was granted a continuance for the time he asked for. The motion was addressed to the sound discretion of the court below, and it is clear that there was no abuse of discretion. 31 Cyc. 645; Cathcart v. Peck, 11 Minn. 45 (Gil. 24); City of Lawton v. Hills, 53 Okl. 243, 156 Pac. 297.

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[3] It is contended that the defendant's promise to the plaintiff was void under the statute of frauds of Alaska. Comp. Laws 1913, §§ 1875–1880. That statute makes void an agreement, unless the same or some note or memorandum thereof expressing the consideration be in writing and subscribed by the party to be charged, or his lawfully authorized agent:

"(1) An agreement that by its terms is not to be performed within a year from the making thereof; (2) an agreement to answer for the debt, default, or miscarriage of another." Section 1876.

This case comes within neither of those provisions. In the first place, the agreement was not one which by its terms was not to be performed within a year from the making thereof. No time was specified for the payment of the balance of $4,000. It was to be paid as soon as McCarty paid the defendant what he owed him. McCarty then owed the money and he might have paid it at any time when he chose to do so. This clause of the statute has been construed in many decisions. It is sufficient to refer to McPherson v. Cox, 96 U. S. 404, 416, 24 L. Ed. 746; Walker v. Johnson, 96 U. S. 424, 427, 24 L. Ed. 834, and Warner v. Texas & Pac. Ry., 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495, in all of which cases it is held that the statute applies only to contracts which by their terms are not to be performed within a year, and not to contracts which may or may not be performed within that time.

[4] In the second place, the defendant's agreement was not to answer for the debt, default, or miscarriage of another. On the receipt of the defendant's promise, the plaintiff reduced his demand against McCarty by $5,000, a demand which was evidenced by an instrument in writing, and in lieu thereof accepted the defendant's oral promise as to $4,000 of that sum. The defendant made the promise, not for the purpose of answering for McCarty's debt, but to subserve his own interests. In Emerson v. Slater, 22 How. 28, 43 (16 L. Ed. 360), the court said:

"Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

To the same effect is Davis v. Patrick, 141 U. S. 479, 488, 12 Sup. Ct. 58, 35 L. Ed. 826.

[5] Numerous assignments of error are directed to the rulings on the introduction of testimony. In none of them do we find merit. One error assigned and principally relied upon is that parol testimony was admitted to contradict the terms of the written instrument executed and delivered by the plaintiff to McCarty of date May 15, 1915, reciting the disputes that had arisen concerning the Totem fraction and the Leitrim claim, and the desire of the parties to compromise, and continuing:

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"Now, therefore, witnesseth: That whereas, Albert Bell would receive $10,000 for the property involved, and in compromise of said controversy the parties hereto agree that said Albert Bell hereby acknowledges the receipt of $5,000 in hand paid as part payment of said option, and is willing to take $5,000 at the expiration of said option as payment in full."

The plaintiff was permitted to testify, over the objection of the defendant, that he did not receive $5,000 at that time, that the intention of the instrument was to reduce the sum payable under the option, and that what he did receive was a note or assignment from the defendant for $1,000, payable out of the output of the Leitrim claim, and the defendant's oral promise to pay him $4,000. The effect of the testimony was but to explain the nature of the transaction as between the plaintiff and McCarty, and it was permissible. 17 Cyc. 629. McCarty corroborated the plaintiff's testimony. It would serve no useful purpose to review further the exceptions taken to the introduction of testimony.

[6] The case having been tried by the court without a jury, the improper admission of evidence, if any such was admitted, is not ground for reversal, where, as here, there is other evidence in the record sufficient to sustain the findings of the court. Streeter v. Sanitary Dist. of Chicago, 133 Fed. 124, 66 C. C. A. 190; West v. East Coast Cedar Co., 113 Fed. 737, 51 C. C. A. 411; Oates v. United States, 233 Fed. 201, 205, 147 C. C. A. 207. We find in this case ample evidence to sustain all the findings. The court below was called upon to ascertain the truth from the conflicting testimony of the plaintiff and the defendant. The plaintiff's testimony is largely corroborated by that of the other parties who were interested in the transactions referred to in the findings.

We find no error. The judgment is affirmed.

(257 Fed. 930)

CASCADEN v. O'CONNOR.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3227.

1. TRUSTS ⟸110—CONSTRUCTIVE TRUSTS—EVIDENCE.
Where complainant and defendant started out on a joint adventure for the location of mining claims, and together located and staked a claim in the name of both, and thereafter discovery was made, but before discovery defendant erased complainant's name from the claim and substituted the name of another, the rule that, in order to establish a constructive trust by parol evidence as against the holder of the legal title, the proof must be clear, definite, and satisfactory, does not apply, for complainant's rights do not rest alone upon evidence of a parol agreement, but upon joint acts of the parties, etc.

2. JOINT ADVENTURES ⟸4(1)—RIGHTS OF PARTIES.
Where complainant and defendant, joint adventurers, located a mining claim, and defendant, after erasing the name of complainant and substituting that of another, who disposed of a one-fourth interest to a bona fide purchaser, made discovery, *held* that, as the discovery by defendant inured to the benefit of both parties, and defendant's act alone made

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possible the conveyance of a one-fourth interest, complainant is entitled to recover a half-interest in the claim.

3. APPEAL AND ERROR ⟸1047(1)—REVIEW—RULINGS ON EVIDENCE.

Where rulings on the admissibility of evidence would not have affected the decree, which was based solely on a question of veracity of two witnesses, such rulings will not be reviewed on appeal.

Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Suit by Pat O'Connor against David H. Cascaden. From a decree for complainant, defendant appeals. Affirmed.

The appellee brought a suit against the appellant to recover an undivided one-half interest in and to the Gold Dollar association placer claim, alleging that on November 30, 1914, the appellant and the appellee located said claim as joint owners thereof, and that thereafter the appellant wrongfully and unlawfully erased the appellee's name from the monuments and stakes on the ground, and inserted thereon the name of another as joint locator with the appellant. The facts as found by the court below are in substance the following:

On November 30, 1914, the appellant and the appellee located the Gold Dollar association placer mining claim, and the location was witnessed by Albert Bell and J. J. Sherry. Thereafter the development work required by law was done on said claims for the joint use of the locators. At some time between the date of the location and February 14, 1915, the appellant wrongfully and unlawfully erased the name of the appellee as one of the locators and substituted therefor the name of Albert Bell. On February 20, 1915, notice of location of the claim was filed in the office of the recorder for the precinct in which the property was situated, in which notice the appellant and Bell were named as the locators of the claim, which notice was prepared by the appellant, and by him caused to be recorded. On or about December 16, 1914, the appellant and Bell entered into an agreement, whereby the latter, in consideration of the cancellation of certain indebtedness due from him and other considerations, covenanted and agreed to deed to the appellant an undivided one-half interest in all his property interests then acquired or to be acquired during the life of the agreement in the "Tolovana country," in which country was the property in controversy here. On or about May 21, 1915, to carry out that agreement, the appellant caused Bell to deed to him undivided interests in and to the properties referred to in the agreement, in which was included a one-fourth interest in the Gold Dollar claim. Thereafter Bell transferred to one McCarty the remaining one-fourth interest in the Gold Dollar, and McCarty was an innocent purchaser for value, and without knowledge of the change made of the locators of the claim.

As conclusions of law the court found that the appellee was entitled to receive from the appellant a deed to an undivided one-half interest in the Gold Dollar placer claim, and to an accounting for the gold extracted therefrom. The accounting was had, and final judgment was entered that the appellant pay the appellee $9,524.15, net proceeds of the undivided one-half of that claim.

The answer of the appellant denied that the Gold Dollar claim was located by him and the appellee, and alleged that the same was located by the appellant and Bell, and that the name of the appellee was never written and never appeared on the monuments of the claim. For an affirmative defense, the appellant alleged that in the month of November, 1914, the appellee went into the Tolovana country, the value of which for mining purposes was then unknown, and acquired certain rights in certain claims there which were of little value, as no discovery of gold had been made thereon, and thereafter, in January, 1915, he declared to the appellant that he had not returned to the Tolovana country, and he did not intend to return thereto or protect any interest therein; that he then and there abandoned whatever mining interest he may have had in that country, and he did not return thereto until May,

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1915; and that by reason of his abandonment thereof none of the mining claims attempted to be located by the appellee in the Tolovana country ever became valid mining claims.

Morton E. Stevens, of Fairbanks, Alaska, and Thomas R. White, of San Francisco, Cal., for appellant.

Leroy Tozier and McGowan & Clark, all of Fairbanks, Alaska (De Journel & De Journel, of San Francisco, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant points to the language of the opinion of the court below, in which it was said that the facts set forth in the complaint were proved "by a fair preponderance of the evidence," and invokes the rule that, in order to establish a constructive trust by parol evidence as against the holder of the legal title, the proof must be clear, definite, unequivocal, and satisfactory. 39 Cyc. 192. We think it should not be held that the expression quoted from the opinion of the trial court indicated that the proof was not of that satisfactory and convincing kind required to sustain a decree in such a case as this. This is not a case in which the legal title stood in the name of the defendant at the time of the initiation of the plaintiff's rights. Here, according to the evidence, the appellant and the appellee started out on a joint venture, traveled and camped together, and, as the court below found, together located and staked the claim in the name of both. There was testimony, which the trial court credited, that they made an agreement, upon which the appellee relied, that the appellant was to complete the location for their joint benefit. Each thereafter made discovery on the claim, but before discovery the appellant, unknown to the appellee, had erased the appellee's name from the claim and substituted the name of another. The rights of the appellee here do not rest alone upon evidence of a parol agreement with the appellant. They rest also upon proof of the joint acts of the parties, whereby the original rights were acquired. As to those acts the testimony of the parties is in direct conflict. The court below rejected that of the appellant and credited that of the appellee. We have no warrant for saying that the court did not find the evidence "clear," "definite," and "unequivocal," and it is clear that the court found it "satisfactory." In Schwartz v. Gerhardt, 44 Or. 425, 75 Pac. 698, the court said that the evidence to establish a constructive trust must be clear and cogent, and such as to satisfy the mind fully. In the present case the court in the opinion said:

"To believe the testimony of the plaintiff is to believe what is reasonable, logical, and probable. It is consistent with what the average prospectors would do under the same circumstances. The plaintiff is also entitled to that full measure of consideration which, since the establishment of courts, has been accorded to the witness who, by his demeanor and manner of giving his testimony, convinces the court of the truthfulness of his statements."

[2] The appellant contends that, inasmuch as the location made on November 30, 1914, was unaccompanied by discovery, and the

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possession was abandoned by the locators, he had the right thereafter to enter upon the ground, and make a new location, and change the name of one of the locators, and that, in any view of the case, the most that a court of equity could award to the appellee would be the one-fourth interest which inured to the appellant by the substitution of Bell's name for O'Connor's, in accordance with the appellant"s general agreement with Bell, by which they were to share equally in all locations made in the name of either. This contention ignores the essential facts upon which the appellant's rights are founded. The appellant and the appellee, as we have found, were engaged in a joint venture, and a fiduciary relation existed between them. The appellant, according to the appellee's testimony, and as the court below found, had agreed to look after the interests of the appellee in this particular mining claim. When the appellant made discovery on the claim, it resulted in validating the location for the benefit of both locators. If the appellant caused the alienation of a one-fourth interest in the claim to an innocent purchaser, so that the same may not be recovcovered, it must be held that he thereby deprived himself, and not the appellee, of a one-fourth interest, and that the appellee was entitled to an undivided one-half interest in the claim, he not having parted with any portion of his interest, and not having been a party to the transaction by which a one-fourth interest was conveyed away.

[3] Other assignments of error present the rulings of the court below on the admission and exclusion of evidence, and refusal to find as requested by the appellant. We find no error in any of them. It is not necessary to review them, for the reason that the court below found on the conflicting testimony that the appellant wrongfully erased the appellee's name as one of the locators and substituted the name of Bell. On that question of fact the whole merits of the controversy rested. It was a question of veracity. The court believed the appellee and his witnesses, and the conclusion reached could not have been affected by any different rulings on the admissibility of evidence. Mining Co. v. Taylor, 100 U. S. 37, 25 L. Ed. 541; Engelstad v. Dufresne, 116 Fed. 582, 54 C. C. A. 38.

We find no error. The decree is affirmed.

(257 Fed. 933)

PUBLIC SERVICE ELECTRIC CO. v. POST.

(Circuit Court of Appeals, Third Circuit. May 2, 1919.)

No. 2423.

1. DEATH ⟸31(1)—ACTION FOR WRONGFUL DEATH—WHO MAY MAINTAIN.
Since a right of action for wrongful death is wholly statutory, only the person designated by the statute may maintain an action thereunder.

2. DEATH ⟸9—ACTION FOR WRONGFUL DEATH—WHO MAY MAINTAIN—AMENDMENT OF STATUTE.
Act March 27, 1917, N. J. (P. L. N. J. p. 531), supplementary to the Death Act, but which makes no change therein, except by providing that actions thereunder shall be brought by an administrator ad prosequendum,

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affects the procedure only, and applies to an action brought after its passage for a death which occurred prior thereto.

3. DEATH ⟸31(4)—ACTION FOR WRONGFUL DEATH—QUALIFICATION OF PLAINTIFF UNDER NEW JERSEY STATUTE.

An administrator with limited letters, appointed under Code Civ. Proc. N. Y. § 2559, to prosecute a right of action, has the same or equivalent powers as an administrator ad prosequendum, appointed under the New Jersey Death Act, as amended by Act March 27, 1917 (P. L. N. J. p. 531), to bring an action thereunder.

4. EXECUTORS AND ADMINISTRATORS ⟸22(2)—APPOINTMENT TO BRING SUIT—NEW YORK STATUTE.

Code Civ. Proc. N. Y. § 2559 et seq., authorizing appointment of an administrator with limited letters, "where a right of action is granted to an executor or administrator by special provision of law," is not limited to cases where the right of action is given by the law of New York.

5. DEATH ⟸31(4)—ACTION FOR WRONGFUL DEATH—ACTION BY FOREIGN ADMINISTRATOR.

Under Act March 26, 1896 (P. L. N. J. p. 173; 2 Comp. St. 1910, p. 2265, § 21), providing that "any executor or administrator by virtue of letters obtained in another state may prosecute any action * * * in any court of this state as if his letters had been granted in this state," an administrator with limited letters, appointed under the New York statutes, may maintain an action under the New Jersey Death Act, as amended by Act March 27, 1917 (P. L. p. 531).

In Error to the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

Action at law by Catherine Post, as administratrix, against the Public Service Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Leonard J. Tynan, of Newark, N. J., for plaintiff in error.
Irving W. Teeple, of Newark, N. J., for defendant in error.

Before WOOLLEY, Circuit Judge, and THOMPSON and MORRIS, District Judges.

MORRIS, District Judge. Joseph Post, a resident of New York, met his death in New Jersey through the alleged wrongful act of Public Service Electric Company, hereinafter referred to as the company, a corporation of the latter state. The decedent left to survive him his widow and three minor children as his next of kin. His widow, Catherine Post, also a resident of New York, presented to the surrogate of the county of their residence a petition setting forth, among other things, the death of her husband in New Jersey; that he was not at the time of his death seized or possessed of any real or personal property; that "a right of action exists, granted to the administrator of the decedent by special provision of law, * * * and that it is impracticable to give a bond"—and praying for limited letters of administration. Such letters were granted to her, and she as such administratrix subsequently instituted suit in the District Court of the United States for the District of New Jersey against the company to recover damages for her husband's death. The suit resulted in a judgment for the plaintiff.

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The case is brought here by the defendant on a writ of error; the company alleging that the court below erred in holding that the administratrix of the decedent, appointed in a state other than New Jersey, "had a good standing in court as plaintiff to sue for damages for the death of the decedent on an alleged cause of action under the New Jersey Death Act based upon wrongful death in New Jersey."

[1] As there is no right of action at common law for death caused by wrongful act or neglect, the cause of action for the death of Post springs solely from the statute of New Jersey, the state in which the injury resulting in death occurred. Spokane Inland R. R. v. Whitley, 237 U. S. 487, 494, 495, 35 Sup. Ct. 655, 59 L. Ed. 1060, L. R. A. 1915F, 736. And since the action is based entirely upon statute, and the statute designates the person who may sue, only the person so designated may bring such action. Fithian v. St. Louis & S. F. Ry. Co. (C. C.) 188 Fed. 842; Fitzhenry v. Consolidated Traction Co., 63 N. J. Law, 142, 42 Atl. 416. We must therefore look to the statute of New Jersey to determine by whom this action must be brought. We find that at the time of the injury and death of the decedent the Death Act of New Jersey provided:

"Every such [action] shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person," etc. (2 C. S. of N. J. 1908.)

After the grant of the letters of administration to the plaintiff, but before this suit was brought, the following supplement to the above-quoted statute went into effect, viz.:

"Every action, proceeding or claim brought, instituted or made under and by virtue of the remedy given by the act to which this is a supplement shall be brought, instituted or made in the name of an administrator ad prosequendum of the decedent whose death gives rise to the claim under the act to which this act is a supplement; * * * the amount recovered in every such action shall be for the exclusive benefit of the widow, surviving husband, and next of kin. * * *" (Laws of N. J. 1917, ch. 180.)

[2] Who was the proper person under this state of the statutory law to bring this suit—a general administrator, as required by the statute in force at the time the injury and death occurred, or an administrator ad prosequendum, as provided by the statute in effect at the time the suit was instituted? If the latter statute merely changed the mode of procedure—the method of enforcing the right—and did not affect the right itself, it applied to causes of action which accrued before its enactment as well as to those accruing thereafter. Wood v. Westborough, 140 Mass. 403, 5 N. E. 613; Lewis' Sutherland, Stat. Const. § 674. An examination of the two statutes discloses that the supplemental act in no wise affected the liability of the defendant and that it changed neither the persons for whose benefit recovery might be had in this suit nor their respective interests in such recovery. The amount recovered does not go into the personal estate of the deceased, to be applied to the payment of his debts, but is for the exclusive benefit of the widow and next of kin. The administrator upon the record, whoever he is, is therefore merely a formal party for the main-

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tenance of the action. Pisano v. Shanley Co., 66 N. J. Law, 1, 48 Atl. 618. The supplemental act, in substituting one person for another as the formal party to prosecute the action, consequently did not affect rights theretofore existing, but only the manner or method of their enforcement. We therefore think that the supplemental act applied to this case, and made it necessary that the suit be brought by an administrator ad prosequendum.

[3] Is the plaintiff such an administrator? The sections of the New York Code of Civil Procedure under which the letters of administration were granted to the plaintiff are:

"2559. Letters may be granted limiting and restricting the powers and rights of the holders thereof as follows:

"To an executor or administrator where a right of action exists."

"2592. Where a right of action is granted to an executor or administrator by special provision of law, * * * and it appears to be impracticable to give a bond * * * the surrogate may dispense with a bond, * * * and issue letters which as to such cause of action shall be limited to the prosecution thereof, and restraining the executor or administrator from compromise of the action or the enforcement of any judgment recovered therein until the further order of the surrogate made upon filing satisfactory security."

The purpose of the appointment in New York of an administrator with limited letters is the same as the purpose of the appointment of an administrator ad prosequendum in New Jersey. The powers of each are substantially, if not entirely, the same. The only difference suggested by counsel is in the power to agree upon a settlement of a claim. But in view of the provisions of section 2720 of the New York Code of Civil Procedure we do not find a difference even here, and we must conclude that the plaintiff is an administrator ad prosequendum.

[4] The plaintiff in error contends, however, that only an administrator ad prosequendum appointed in the state of New Jersey may bring this suit, and that the New York statute providing for limited letters, "where a right of action is granted to an executor or administrator by special provision of law" necessarily refers to a special provision of New York law. We think neither of these contentions can be sustained in view of Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439. In that case the plaintiff, a New York administrator, brought suit in the state of New York to recover damages for the death of her husband resulting from an injury in New Jersey. The objection now raised as to an administrator ad prosequendum was there interposed as to the general administrator, viz. that, conceding the statute of the state of New Jersey established the liability of the defendant and gave a remedy, "the right of action is limited to a personal representative appointed in that state and amenable to its jurisdiction." The Supreme Court overruled that contention, and we think its reasoning as to a general administrator equally applicable to an administrator ad prosequendum. The Supreme Court likewise held that the liability for wrongful death, arising under the New Jersey statute, could be enforced and the right of action pursued by the New York administrator in any court of New York having juris-

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diction of such matters and obtaining jurisdiction of the parties. We therefore see no reason why such right of action is not within both the letter and spirit of the New York statute providing for limited letters of administration, "where a right of action is granted to an executor or administrator by special provision of law." To construe the statute as applying only where a right of action is granted to an executor or administrator by special provision of New York law would require us to interpolate into the statute something that is not there and which would be unduly restrictive of its purpose.

[5] But could this plaintiff, as administratrix appointed in New York, prosecute this action in New Jersey? It is true that letters of administration have no extraterritorial force. Story's Conflict of Laws, p. 425. But the authority of the plaintiff to prosecute this action in New Jersey is not dependent on extraterritorial force of the New York statute. Such authority, if any, must be found in the laws of New Jersey, and a statute of that state expressly provides:

"*Any* executor or administrator by virtue of letters obtained in another state may prosecute any action * * * in any court of this state as if his letters had been granted in this state." P. L. 1896, p. 173; 2 C. S. of N. J. 2265.

It appearing from the foregoing considerations that the plaintiff has title to this cause of action, and that, though a foreign administratrix, she was authorized to prosecute it in the state of New Jersey, we find there was no error in permitting her to maintain this suit.

The judgment below is affirmed.

(257 Fed. 937)

SCANDINAVIA BELTING CO. v. ASBESTOS & RUBBER WORKS OF AMERICA, Inc.*

(Circuit Court of Appeals, Second Circuit. March 3, 1919.)

No. 49.

1. TRADE-MARKS AND TRADE-NAMES ⟸97—NATURE—RIGHT TO INJUNCTION.
The right to a trade-mark is a property right entitled to the same protection as any other property right, and equity can restrain the use of such trade-mark by another under its power to protect property from irreparable damage.

2. TRADE-MARKS AND TRADE-NAMES ⟸1, 3(2, 4), 7—"TRADE-MARK"—DESCRIPTIVE WORDS.
A word merely descriptive of an article or the current name of an article, or of a general character of a business, cannot be used as a "trade-mark," which is a mark or symbol used by one who manufactures or sells goods to distinguish them from similar goods manufactured or sold by another.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trade-Mark.]

3. TRADE-MARKS AND TRADE-NAMES ⟸9—GEOGRAPHICAL NAMES.
A geographical name which does not indicate the origin or ownership of the goods and can be truthfully used by any other manufacturer or trader

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 250 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

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of the same locality cannot be a common-law trade-mark, unless there is no other who can truthfully use the name, or unless from the name, as applied to the article, it is manifest that it is used in a purely arbitrary sense.

4. TRADE-MARKS AND TRADE-NAMES ⟸67—UNFAIR COMPETITION—USE OF GEOGRAPHICAL NAME.

Where a geographical name originally used to indicate place of origin has acquired a secondary significance, indicating the name of the manufacturer or seller, and the excellence of the thing made or sold, it does not thereby become a common-law trade-mark, but its unfair use by others to deceive the public as to the origin or ownership of goods may be restrained as unfair competition.

5. TRADE-MARKS AND TRADE-NAMES ⟸0—GEOGRAPHICAL NAMES—DESCRIPTIVE MEANING.

The word "Scandinavia" applied to the belting of a particular manufacturer is a descriptive geographical name, which cannot be a common-law trade-mark, though the belting is made in England; since it does not appear from the name itself that it is not the designation of the place of manufacture.

6. TRADE-MARKS AND TRADE-NAMES ⟸45—REGISTRATION—EFFECT.

The registration of a trade-mark under Act Feb. 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), does not validate a trade-mark not previously valid, unless the trade-mark comes within the provision for the registration of any trade-mark exclusively used for ten years.

7. TRADE-MARKS AND TRADE-NAMES ⟸21—USE IN FOREIGN COUNTRY.

The use of a word as a trade-mark for a particular kind of belting manufactured in a foreign country does not preclude the courts of this country from protecting the trade-mark in so far as the goods to which it applied were sold here.

8. TRADE-MARKS AND TRADE-NAMES ⟸43—REGISTRATION—"OWNER."

A corporation, to whom a foreign manufacturer had agreed to sell its products exclusively in this country and to give exclusive use of its trade-mark for a period longer than the period of registration, is an "owner" of the trade-mark entitled to register it under Act Feb. 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), the word "owner" in statutes being given a varied significance according to the context, and, even if the corporation is an agent of the manufacturer, it is an agent with an interest and a special owner entitled to the benefit of the act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Owner.]

9. STATUTES ⟸184—CONSTRUCTION—PURPOSE.

Statutes are to be given a rational and sensible construction, in view of the object sought to be obtained and the evil to be remedied.

10. TRADE-MARKS AND TRADE-NAMES ⟸43—REGISTRATION—GEOGRAPHICAL NAMES—EXCLUSIVE USE.

One who had exclusively used the word "Scandinavia" as his trade-mark for belting since 1892 is entitled, under the provision of the act of February 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), that nothing in the act should prevent the registration of a mark used exclusively as a trade-mark for more than 10 years preceding the act, to register it as a trade-mark; though it is a geographical word which could not be a trade-mark at common law.

11. TRADE-MARKS AND TRADE-NAMES ⟸85(1)—UNFAIR COMPETITION—DEFENSES—ATTEMPT TO REGISTER.

An attempt to register a trade-mark by one who was not the owner is not a fraud which bars the user's remedy for unfair competition, where he acted on a mistaken view of the law honestly entertained.

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12. TRADE-MARKS AND TRADE-NAMES ⟸85(1)—UNFAIR COMPETITION—DEFENSES—FRAUD OF PLAINTIFF.

The use of the word "Scandinavia" as a trade-mark for belting manufactured in England by the successors of one who had previously worked in Sweden is not a fraud, which prevents the owners of the trade-mark from seeking relief in equity; there being no evidence of intention to deceive or of deception as to the place of manufacture.

13. TRADE-MARKS AND TRADE-NAMES ⟸11—EXTINGUISHMENT—USE WITH PATENTED ARTICLE.

The use of the word "Scandinavia" as a trade-mark of a patented belting does not give the public the right to use the trade-mark after the expiration of the patent, in the absence of evidence that the manufacturer had expressly or impliedly consented that such word should become the descriptive generic name of the article patented.

14. TRADE-MARKS AND TRADE-NAMES ⟸45—REGISTRATION—NAME OF PATENTED ARTICLE.

The failure of the public to use the trade-mark of a patented article after the expiration of the patent, until after the trade-mark had been registered under the 10-year clause of the act of February 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), prevents the use of such trade-mark thereafter by any one but the owner.

15. TRADE-MARKS AND TRADE-NAMES ⟸70(3)—UNFAIR COMPETITION—IMITATION OF TRADE-MARK.

Where it was shown that the term "Scandinavia" applied to belting was understood to mean plaintiff's product, in which it had built up a large business, and that defendant, in response to requests for such belting, had put out a product similar in appearance and designated as "Scandinavian belting," complainant was entitled to an injunction to restrain unfair competition.

16. TRADE-MARKS AND TRADE-NAMES ⟸66—INFRINGEMENT OF TRADE-MARK—LOSS TO PLAINTIFF.

The owner of a registered trade-mark can restrain its use by another, though no loss of sales is shown and there may be no fraud between the original seller and buyer of the infringing article.

17. TRADE-MARKS AND TRADE-NAMES ⟸69, 93(1)—UNFAIR COMPETITION—PROOF OF FRAUD.

Actual fraud must be shown in a suit to restrain unfair competition, but the simulation of well-known and distinctive features of complainant's goods may be so close that the court can assume an intent to defraud.

Appeals from the District Court of the United States for the Southern District of New York.

Suit by the Scandinavia Belting Company against the Asbestos & Rubber Works of America, Incorporated, for an injunction to restrain the use of a trade-mark and unfair competition. From a decree denying complainant's right to a trade-mark, but granting injunction on the ground of unfair competition, both complainant and defendant appeal. So much of the decree as dismissed the cause of action as to the trade-mark reversed, with directions to sustain the trade-mark, and decree, as modified, affirmed.

This cause comes here on appeal from the United States District Court for the Southern District of New York.

The plaintiff is a corporation organized and existing under the laws of the state of Maine and has its principal place of business in the borough of Manhattan in the city of New York. It is engaged in the business of selling throughout the United States woven textile belting known in the trade as "Solid Woven Belting." The largest part of the plaintiff's goods are sold by it

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under the trade-mark "Scandinavia," of which trade-mark it claims the ownership within the United States. The belting which the plaintiff sells is manufactured for it in England by the Scandinavia Belting, Limited, a British corporation.

The plaintiff's trade-mark is registered in the plaintiff's name in the Patent Office of the United States under the act of Congress of February 20, 1905.

It is alleged that because of the great use by the public of the plaintiff's belting, and because of the information the plaintiff has conveyed to the public regarding its belting and trade-mark, the trade-mark "Scandinavia" has come to mean the particular belting manufactured for and sold by the plaintiff.

The defendant is a corporation organized and existing under the laws of the state of New York and has its principal place of business in the borough of Manhattan in the city of New York. It is engaged in the manufacture of belting and manufactures a brake band lining for automobiles. It is using the words "Scandinavian Woven Lining," "Ford Scandinavian Woven Lining," and "Ford Scandinavian Brake Lining" to designate its brake linings.

The plaintiff alleges that defendant's goods are a cheap imitation of the plaintiff's, and that, closely resembling them in outward appearance, they are of a greatly inferior quality, and are sold at a less price than the plaintiff's goods.

The plaintiff alleges that defendant fraudulently adopted the word "Scandinavian" for the purpose of inducing the public to purchase defendant's belting in the belief that it is the belting of the plaintiff, the belting of both being sold and used for the same purpose; and that defendant willfully adopted such name for the purpose of defrauding the public and the plaintiff, selecting such name because the name itself would mislead and deceive the public into purchasing and using defendant's belting under the mistaken belief that the same was the product of the plaintiff, and for the purpose of thereby depriving plaintiff of its lawful rights under its trade-mark, and in infringement of plaintiff's rights, both at common law and under its registered trade-mark; and that the said acts of defendant tend to deceive and have actually deceived the public and led it to believe that the belting so sold by the defendant under the name Scandinavia or Scandinavian is that originating with the plaintiff.

The plaintiff asks for an accounting of the profits and for damages and for an injunction.

The decree dismissed the cause of action as to the registered trade-mark holding the registration invalid; and it dismissed the cause of action as to the common-law trade-mark on the ground that the word "Scandinavia" is a geographical word and therefore cannot be acquired as a common-law trade-mark. The decree, however, sustained the cause of action as to unfair competition, and it directed that a perpetual injunction issue directing the defendant to desist:

"(a) From manufacturing, billing, cataloguing, selling, offering for sale or advertising belting or brake lining, not of plaintiff's manufacture, under the names or designations 'Scandinavian Woven Lining,' 'Ford Scandinavian Woven Lining,' 'Ford Scandinavian Brake Lining,' 'Scandinavian Weave,' 'Scandinavian Woven Type,' 'Scandinavian' and the abbreviated form of the word 'Scandinavian,' to wit, 'Scand,' or under any of such names or designations, or under any word or words of like import, and from using or causing to be used orally or in written or printed matter or in any bills or correspondence such names or designations, or any of them, for belting or brake lining, not of plaintiff's manufacture, and from causing confusion in the trade by any false use or imitation of plaintiff's trade-name 'Scandinavia,' calculated to mislead or deceive. And

"(b) from manufacturing, billing, cataloguing, putting up, selling, offering for sale, disposing of or advertising cartons or packages containing brake lining or belting and bearing the name 'Scandinavia' or 'Scandinavian,' or any imitation thereof, or word of like import, and particularly cartons like the carton identified as plaintiff's Exhibit No. 14, carton containing brake lining

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of defendant sold under the name 'Scandinavian Woven Type,' and from disposing of all cartons like plaintiff's Exhibit No. 14."

The decree also directed that plaintiff recover any and all profits accruing from defendant's violation of plaintiff's equitable rights and referred the same to a master to state an account of the damages and profits.

Both parties have appealed to this court.

William A. Redding and Nicholas M. Goodlett, both of New York City, for plaintiff.

Munn, Anderson & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for defendant.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This suit is brought in an attempt to secure to the plaintiff the exclusive use of the name "Scandinavia" as applied to belting. The plaintiff claims that it has a trade-mark in that name, both by virtue of the common law and by the registration of the name under the act of Congress providing for the registration of trade-marks.

[1] It has been said frequently that the doctrine of exclusive property in trade-marks has prevailed from the time of the Year Books. But an examination of the record hardly justifies the statement, in the opinion of Mr. Upton, who nevertheless declares that—

"Property in trade-marks, exclusive and absolute, has existed and been recognized as a legal possession, which may be bought and sold and transmitted, from the earliest days of our recorded jurisprudence." Upton on Trade-Marks, p. 10.

However early property in trade-marks may have been recognized, it is only in comparatively recent times that courts of equity have interfered by injunction for its protection. For in Blanchard v. Hill, 2 Atkyns, 484, in 1742, an application was made to Lord Chancellor Hardwicke for an injunction to restrain the defendant from making use of the Great Mogul as a trade-mark upon cards. The Lord Chancellor declared:

"There is no foundation for this court to grant such an injunction. Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here, to restrain one trader from using the same trade-mark with another; and I think it would be of mischievous consequence to do it."

But it is now and for many years has been well-established doctrine that the exclusive property of a proprietor of a trade-mark by virtue of the manufacture or offering for sale of his goods is entitled to the protection which the highest powers of the courts can afford. And the power of the court in such cases is exercised, not only to do individual justice, but to safeguard the interests of the public by preventing one's passing off his goods as the goods of another. The right of property in trade-marks has come to be recognized as of immense and incalculable value. Trade-marks, it has been truthfully said, are the only means by which the manufacturer and the merchant are enabled to inspire and retain public confidence in the quality and integ-

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rity of things made and sold, and the only means by which the public is protected against the frauds and impositions of the crafty and designing who are always alert to appropriate to themselves the fruits of the reputation of others.

The jurisdiction of an equity court to restrain by injunction the passing off by A. of his own goods as being the goods of B. is in aid of the legal right and is founded on the equity of protecting property from irreparable damage. In such a case, the court acts on the same principles upon which it interferes in other cases in protecting legal rights to property. Kerr on Injunctions, p. 357.

The court below has held that the plaintiff is entitled to an injunction, but that it is entitled to it on the ground of unfair competition, and not because it has a trade-mark which has been infringed.

[2] The law recognizes the right of every one who manufactures or sells goods to affix to them a mark or symbol which may distinguish them from similar goods manufactured or sold by another. The mark or symbol so used is known as a "trade-mark." While any name, symbol or emblem may in general be a trade-mark, yet the law does not allow a word to be so used which is merely descriptive of an article, or which is the current name of an article, or which merely denotes the general character of a business. And one of the questions raised in the case now under consideration is whether the word "Scandinavia" used by the plaintiff as a trade-mark is one which can be so employed.

[3] In 38 Cyc. 722, it is said that—

"Geographical terms and words in common use to designate a locality, a country, or a section of a country cannot be monopolized as trade-marks. In some cases geographical names have been protected nominally upon the ground of trade-mark, but these cases must be supported, if at all, upon the ground of unfair competition."

In 28 Am. & Eng. Encyc. of Law, 377, the rule is stated as follows:

"It is well settled that a geographical term, by which is meant a term denoting locality, cannot be exclusively appropriated as a trade-mark or trade-name, because such a term is generic or descriptive, and any one who can do so truthfully is entitled to use it. Geographical terms may, however, by long and exclusive user acquire a secondary significance as denoting the goods or business of the particular trader who has so used them, and under such circumstances a subsequent trader will not be permitted to use such terms in a manner that will be likely to deceive the public, and pass off his goods or business as being the goods or business of his rival, for this would constitute unfair competition."

In Browne on Trade-Marks the law is thus stated:

"Sec. 182. *Geographical Names.*—Instances are not rare where these have been sustained as technical trade-marks. But in every case of the adoption of the name of a country, nation, region, or place, such name has been used in an arbitrary sense, and not adjectively; except where the owner of the mark was also sole possessor of the place of origin, or had the monopoly of the vendible product, as for example, of a mineral spring, or an established place of manufacture. Under circumstances of an exclusive right of sale, such a name cannot be said to be merely geographical. To be such, all or many others than the claimant, should have a right equal to his own to apply a trade-mark."

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The House of Lords in 1872 decided the well-known case of Wotherspoon v. Currie, L. R. 5 H. L. Eng. & Ir. App. Cases, 508. In that case a bill had been filed to enjoin the respondent from using the geographical name "Glenfield" in connection with the manufacture of starch. The complainants had formerly carried on the business of starch makers at Glenfield which was a small place, not even a hamlet, in the neighborhood of Paisley in Scotland. The starch they manufactured was commonly known as "Glenfield Starch." The business was, after some years, removed to a larger place called "Maxwelltown," which was also near Paisley, and the starch there manufactured continued to be sold as "Glenfield Starch." The respondent had for many years lived at Glenfield, but had carried on his business of manufacturing starch in his works at Paisley. Some time after the complainant's removal of his business from Glenfield to Maxwelltown, the respondent began making starch in Glenfield, calling his product "Glenfield Starch," and selling it under that name in Scotland and in England. The respondent's label stated that it was manufactured by "Currie & Co.," and the complainant's label stated that its starch was manufactured by "Robert Wotherspoon & Co." The suit was brought on the theory that the geographical name "Glenfield" had become the trade-mark of the complainant's business, and that, although the complainant had ceased to manufacture his product in Glenfield, he was entitled to restrain the respondent from using the same trade-mark, although the respondent actually made his starch in Glenfield. The House of Lords, reversing the court below, granted the injunction and restrained the respondent from using the word "Glenfield" in or upon any labels affixed to his packets of starch, and from in any other way representing the starch manufactured by or for him to be "Glenfield Starch." It is not suggested in any of the opinions delivered in the House of Lords that a trade-mark could not be had in a geographical name. Lord Chelmsford in the course of his opinion puts the question involved in this way:

"Has the respondent then been proved to have infringed the appellant's trade-mark within the established principle?"

And Lord Westbury in his opinion states that the word "Glenfield" had acquired a secondary meaning and had become "the trade denomination" of the starch made by the appellant, and he declares that the case comes within the principle that a party should be prevented from fraudulently availing himself of the trade-mark of another which has already obtained currency and value in the market. Notwithstanding what two of the Lords said as to the validity of the trade-mark, it does not certainly appear whether the decision went upon the ground that there was a valid trade-mark which had been infringed or upon that of unfair competition. That the plaintiff was entitled to the injunction upon the latter ground can be readily perceived. But one cannot help wondering whether all the Lords agreed that the trade-mark was valid. Then nearly 20 years later the House of Lords had before it Montgomery v. Thompson (1891) A. C. 217. Thompson and his predecessors had bottled ale, at a town in England called Stone,

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for 100 years or more. This ale had become known as "Stone Ale." During the above period the brewery of Thompson had been the only one in town. In 1890 Montgomery, who had been a publican at Liverpool, removed to Stone and set up "Montgomery's Stone Brewery." He claimed he had a legal right to use the name "Stone Brewery" so long as he used it in combination with other words which sufficiently distinguished his manufacture from that of Thompson. The court below had issued an injunction restraining him from carrying on his business of a brewer at Stone either under the name "Stone Brewery," or under that of "Montgomery's Stone Brewery," or under any other title so as to represent that the Montgomery Brewery was the brewery of Thompson, and from selling or causing to be sold any ale or beer not of Thompson's manufacture under the term "Stone Ales" or "Stone Ale," or in any way so as to induce the belief that such ale or beer was of Thompson's manufacture. The House of Lords affirmed the injunction. Lord Herschell in his opinion said:

"It appears to me idle to argue in opposition to the injunction that it is against the public interest to permit a monopoly of the use of the name of a town for trade purposes, when the only effect of allowing its use by the person and for the purpose sought to be restrained would be to deceive the public."

In Wotherspoon v. Currie the trade-mark was not actually copied, and while, as the quotations above made show, there are in the opinions rendered by two of the Lords expressions which seem to indicate that in their opinion the trade-mark was not invalid, the case was really decided on the ground that the respondent was acting with the fraudulent design of passing off his own goods as those of the complainant's. And Thompson v. Montgomery does not assert an exclusive right to the use of the word "Stone Ale" as against the world, but as against the defendant who was shown to be engaged in fraudulently using the words for the purpose of passing off his goods as the goods of the plaintiff, as most clearly appears in the opinion of Lindley, L. J., in the Court of Appeal, 41 Ch. Div. 35, 50.

We come now to consider the cases in the Supreme Court of the United States. In Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581 (1871), the complainants claimed an exclusive right to the use of the words "Lackawanna Coal" as a trade-mark for the coal mined by them, and their bill alleged that they had appropriated the word "Lackawanna" as a trade-mark for their coal before any one else had applied it as a trade-mark for any kind of coal. In affirming the court below which had refused the injunction, the court said:

"And it is obvious that the same reasons which forbid the exclusive appropriation of generic names or of those merely descriptive of the article manufactured and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated exclusively, the appropriation would result in mischievous monopolies." 13 Wall. 324, 20 L. Ed. 581.

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In Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144 (1893), the complainant, a manufacturer of flour at Minneapolis, sought to restrain the defendants from using the word "Columbia" in a brand placed on flour sold by them. The court below had dismissed the bill. The Supreme Court in an opinion in which it stated that the general principles of law applicable to trade-marks, and the conditions under which a party may establish an exclusive right to the use of a name or symbol were well settled by its decisions, then went on to say that these decisions establish the following general propositions:

"* * * (4) Such trade-mark cannot consist of words in common use as designating locality, section, or region of country."

In Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365 (1901), the Supreme Court had before it the question whether the plaintiff had a trade-mark in the geographical name "Elgin" which it had registered under the act of Congress of 1892. The court held:

"That the general rule applied, and that this geographical name could not be employed as a trade-mark and its exclusive use vested in appellant, and that it was not properly entitled to be registered as such."

In French Republic v. Saratoga Vichy Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247 (1903), the plaintiff claimed a trade-mark in the geographical name "Vichy," which was the name of a commune of France whose springs for several hundred years had been famous for their medicinal qualities. The trial court had dismissed the bill upon the ground that the plaintiff had no exclusive right to the use of the word "Vichy" and that defendant had never been guilty of an attempt to palm off its waters as the imported article (C. C.) 99 Fed. 733. The case was brought to this court, where it was reversed and an injunction was ordered in an opinion which will be subsequently considered. 107 Fed. 459, 46 C. C. A. 418, 65 L. R. A. 830. The Supreme Court did not agree that a case had been made out justifying the issuance of an injunction, as the use of the word "Vichy" on defendant's label was so different in style, language, and form from that of the complainant that it would not deceive the public, and there had been acquiescence for a period of nearly thirty years. Mr. Justice Brown writing for the court said:

"1. As the waters of Vichy had been known for centuries under that name, there is reason for saying the plaintiffs had in 1872 acquired an exclusive right to the use of the word 'Vichy' as against every one whose waters were not drawn from the springs of Vichy, or at least, as observed by a French court, 'from the same hydrographical region which may be called generally the basin of Vichy.'

"True the name is geographical; but geographical names often acquire a secondary signification indicative not only of the place of manufacture or production, but of the name of the manufacturer or producer and the excellence of the thing manufactured or produced, which enables the owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits; and even as against them, if the name

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be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced, or of palming off the productions of one person as those of another."

We do not understand that the court in the above case decided that a trade-mark exclusive as to some but not as to all is a technical trade-mark valid at common law. What the court said is entirely consistent with the theory that the owner of the mark might be protected under the law of unfair competition.

In Baglin v. Cusenier Co., 221 U. S. 580, 31 Sup. Ct. 669, 55 L. Ed. 863 (1911), the court had before it the validity of the word "Chartreuse" as a trade-mark. For several hundred years the Order of Carthusian Monks had occupied the Monastery of the Grande Chartreuse near Voiron in France. They there made by a secret process the liqueur which in time became known throughout the world as "Chartreuse." They first manufactured it in the monastery, and later at a place near by called "Fourvoirie." These monks having been forcibly expelled from France set up their factory at a place in Spain where they continued to manufacture the liqueur according to their secret process, and continued its sale on the market as "Chartreuse." The French undertook to produce at Fourvoirie a liqueur resembling as nearly as they could make it the "Chartreuse" of the monks, and they placed their product on the market under the old name. A suit was brought in the Southern district of New York to restrain the use of the name by injunction. The Circuit Judge held that the word "Chartreuse" was a valid trade-mark and was infringed and awarded an injunction. 156 Fed. 1019. On appeal to this court (164 Fed. 25, 90 C. C. A. 499) Judge Coxe writing for this court said:

"Its ['Chartreuse'] primary meaning was undoubtedly geographical, but it acquired afterwards a secondary meaning, so that a purchaser prior to 1901 ordering a case of 'Chartreuse' would expect to receive liqueur made by monks at the French monastery."

We sustained the right to the injunction. In the Supreme Court it was insisted that the judgment was erroneous in holding that the word "Chartreuse" constituted a valid trade-mark. It was argued that "Chartreuse" is a regional name; that the characteristic qualities of the liqueur were due to certain local advantages by reason of the herbs found and cultivated within the district described; that even as used in connection with the monks' liqueur it was still a description of place; and hence that, at most, so far as this word is concerned, the question could be one only of unfair competition. In an opinion written by Mr. Justice Hughes it was declared that the validity of the argument could not be admitted. He said:

"It is not necessary for us to determine the origin of the name of the order and its chief monastery. If it be assumed that the monks took their name from the region in France in which they settled in the eleventh century, it still remains true that it became peculiarly their designation. And the word 'Chartreuse' as applied to the liqueur which for generations they made and sold cannot be regarded in a proper sense as a geographical name. It had exclusive reference to the fact that it was the liqueur made by the Carthusian Monks at their monastery. So far as it embraced the notion of place, the

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description was not of a district, but of the monastery of the order—the abode of the monks—and the term in its entirety pointed to production by the monks."

In Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629 (1916), an injunction was sought to restrain infringement of an alleged trade-mark for shoes consisting of the words "The American Girl," by the use of the words "American Lady." The Circuit Court of Appeals in the Eighth Circuit held that the term "The American Girl" used to designate women's shoes was a geographical and descriptive, rather than an arbitrary and fanciful name, and was not the subject of a valid trade-mark. But it ordered an injunction to issue on the ground of unfair competition. 165 Fed. 413, 91 C. C. A. 363. The Supreme Court declared that it did not regard the words "The American Girl" as used by the complainant in connection with the manufacture of shoes as being a geographical or descriptive term. "It does not signify," said the court, "that the shoes are manufactured in America, or intended to be sold or used in America, nor does it indicate the quality or characteristics of the shoes. Indeed, it does not, in its primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected by complainant's predecessors to designate shoes of their manufacture." It held that the trade-mark was good and infringed, and that the injunction should issue on that ground and not on the ground of unfair competition. The Chief Justice and Mr. Justice Van Devanter dissented on the ground that the term was geographical and descriptive and not subject to exclusive appropriation as a trade-mark.

We shall not attempt an examination of all the cases decided in which the validity of geographical terms used as trade-marks have been considered, but shall refer to some of them.

In Coffman v. Castner, 87 Fed. 457, 31 C. C. A. 55, the Circuit Court of Appeals in the Fourth Circuit said:

"A geographical name cannot be appropriated to the exclusive use of any person or company as a trade-mark."

In Genesee Salt Co. v. Burnap, 73 Fed. 818, 20 C. C. A. 27, the Circuit Court of Appeals in the Sixth Circuit said:

"The name 'Genesee,' when used in connection with complainant's salt, obviously refers to the place of its production. The complainant could, therefore, assert no trade-mark property in it."

In Illinois Watch-Case Co. v. Elgin National Watch Co., 94 Fed. 667, 35 C. C. A. 237, the Circuit Court of Appeals for the Seventh Circuit said:

"It is not now a question that no one can acquire an exclusive right to the use of geographical names as trade-marks."

In Allen B. Wrisley Co. v. Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54, the Circuit Court of Appeals for the Eighth Circuit declared that—

"Geographical terms and words in common use to designate a locality, a country, or a section of a country, cannot be monopolized as trade-marks."

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And the same court had previously made the same statement in Shaver v. Heller & Merz Co., 108 Fed. 821, 831, 48 C. C. A. 48, 65 L. R. A. 878.

In La Republique Française v. Saratoga Vichy Springs Co., 107 Fed. 459, 46 C. C. A. 418, 65 L. R. A. 830 (1901), this court said:

"It is true that a mere geographical name, without attending facts which have caused the name to become significant of a particular manufacture and to identify the manufacture as the product of a particular person, is not the subject of a trade-mark."

The court then continued:

"The distinction, however, between mere names of a locality and the secondary signification of names which identify an article with its manufacturer or producer, and which tell the public that an article so produced is of singular excellence, with the result that the use of the name by a nonresident producer is unfair to the competitor and fraudulent to the public, has been long recognized."

In other words, if a geographical term acquires a secondary meaning, there may be a remedy under the doctrine of unfair competition.

In Siegert v. Gandolfi, 149 Fed. 100, 79 C. C. A. 142, this court held that the complainants could not obtain a monopoly in the use of a geographical word as a trade-mark. An injunction was issued, but it went on the ground of unfair competition.

In Wertheimer v. Batcheller Importing Co., 185 Fed. 850 (1911), Judge Lacombe, sitting in the Circuit Court for the Southern District of New York, granted a preliminary injunction preventing the defendant from calling its product "Poudre de Riz de Java," which words constituted the complainant's trade-mark. The court said:

"The phrase 'Poudre de Riz de Java' is apparently no more a statement that the rice used in it was grown on the Island of Java than the use of the phrase 'Eau de Cologne' imports that the liquid perfume thus designated was made at Koln am Rhein."

The phrase had acquired a secondary meaning. And the case may have been decided under the principle of unfair competition. In Stein & Co. v. Liberty Garter Mfg. Co., 198 Fed. 959 (1912), the same judge, sitting in the District Court, granted a preliminary injunction against the use of the word "French" as applied to garters, and in doing so declared that the complainant had "shown its ownership in a valid trade-mark in the word 'Paris' as applied to garters." But as the circumstances are not fully disclosed the exact signification of the decision is not clearly understood.

In 1846, Taylor v. Carpenter, 3 Story, 458, the plaintiffs were manufacturers in Leicester, England, of "Taylor's Persian Thread" and had established agencies in New York, Boston, and other places in this country, for the sale of their threads. They complained that the defendant imitated their names, trade-marks, and labels, and asked for an injunction. Judge Story granted the injunction, saying:

"I have not the slightest doubt, in the present case, that a perpetual injunction ought to be granted."

Nothing was said either upon the argument or in the opinion as to the use of a geographical term as a trade-mark. The case appears

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to have been one of unfair competition, although the exact ground upon which it was decided is not disclosed.

In 1844 the same parties had been before Chancellor Walworth in New York, and he granted an injunction, but did not discuss the question whether a geographical name could be used as a trade-mark. Taylor v. Carpenter, 11 Paige (N. Y.) 292, 42 Am. Dec. 114. The case was carried to the Court for the Correction of Errors (2 Sandf. Ch. 604), where it was affirmed, but without discussion as to the validity of a trade-mark consisting of a geographical name.

In Walter Baker & Co. v. Baker (C. C.) 77 Fed. 181, the words "German Sweet Chocolate" were held to be a valid trade-mark and infringed by the words "Germania Sweet Chocolate." The case was decided by a judge sitting in the Circuit Court for the Western District of Virginia. The objection was made that the word "German," the name of the individual manufacturer, was also a geographical name, but the court disregarded the objection, saying: "It is the name of an individual, adopted as an arbitrary or fancy name."

In Wolfe v. Goulard, 18 How. Prac. (N. Y.) 64, "Schiedam Schnapps" was held not to be a good trade-mark; "Schiedam" being the name of a town in Holland, and "Schnapps" being adopted from the German language meaning a dram. The plaintiff used the words to designate the liquor which he sold.

In Lea v. Wolf, 13 Abb. Prac. N. S. (N. Y.) 389, it was held that "Worcestershire Sauce," "Worcestershire" being the name of the place where the plaintiff had carried on the business for 30 years, was not a valid trade-mark, and Ingraham, D. J., said that—

"The whole course of authority on this subject is uniform against the right of any party to obtain a trade-mark by such words."

The injunction was denied. On appeal to the General Term of the Supreme Court the injunction was ordered, the court saying that—

"Where words, and the allocation of words, have, by long use, become known as designating the article of a particular manufacturer, he acquires a right to them, as a trade-mark, which competing dealers cannot fraudulently invade." Abb. Prac. N. S. (N. Y.) vol. 15, p. 3.

In Newman v. Alvord, 51 N. Y. 189, 10 Am. Rep. 588 (1872), the right of the plaintiff to use the word "Akron" as a trade-mark in connection with the production and sale of cement was before the court. It was held that as against the defendants the plaintiff had the right to the exclusive use of the word. The court thought that it was unnecessary to show that the plaintiff had the exclusive right to the word; that it was enough if he had an exclusive right as against the defendant. The case is usually understood to have been decided on the principle of unfair competition.

In Kayser & Co. v. Italian Silk Underwear Co., 160 App. Div. 607, 146 N. Y. Supp. 22 (1914), an injunction issued to protect the trademark "Italian" as applied to silk underwear, the court holding that the word had acquired a secondary meaning. Neither plaintiff nor de-

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fendant used any Italian silk in the manufacture of the underwear. The case was decided as one of unfair competition.

In Phenix Cheese Co. v. Kirp, 176 App. Div. 735, 164 N. Y. Supp. 71 (1917), the court issued an injunction to protect the name "Philadelphia Cream Cheese," and the defendants were restrained from using those words. The court thought the name had acquired a secondary meaning, and the injunction went on the ground of unfair competition.

The objection to the use of a geographical name as a trade-mark is twofold:

(1) It does not indicate the origin, manufacture, or ownership of the goods.

(2) There can be no exclusive right to make use of it as any other manufacturer or trader from the same country or section of the country has an equal right to use it.

Thus in the English Court of Chancery Vice Chancellor Wood declared that, if the first importer of wine from Burgundy called it "Burgundy," he could not prevent anybody else from calling a wine produced in Burgundy by the name of the place from which it was imported, although he had stamped "Burgundy" on his corks for 20 years. McAndrew v. Bassett, 4 De G. J. & S., 380. This rests upon the principle that no person has the right to the exclusive use of a mark which is of such a character that others may employ it with equal truth. It was for that reason that the word "Lackawanna" as applied to coal was not a good trade-mark for any one whose coal came from the "Lackawanna Valley" could truthfully designate and sell his coal as "Lackawanna Coal."

That there may be exceptions to the rule that a geographical word cannot be a valid trade-mark is conceded. If one should own the only coal mine situated in a place and should give his coal the name of that place, there is no reason why the name should not be recognized as a valid trade-mark. Newman v. Alvord, 51 N. Y. 189, 193, 10 Am. Rep. 588. Upon that principle was decided Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82, as the plaintiff owned the sole place where the water was found so that none other could use the trade-mark with truth. And this doctrine was recently recognized in Manitou Springs Mineral Water Co. v. Schueler, 239 Fed. 593, 152 C. C. A. 427 (1917).

The courts, too, have sometimes justified a purely arbitrary use of a geographical name where such use could not possibly mislead or deceive any one. Thus in Fleischman v. Shuckmann, 62 How. Prac. (N. Y.) 92 (1881) Judge Van Vorst sitting in the Supreme Court of New York, Special Term, held that a manufacturer of bread in New York City had clearly a right to call it by way of distinction "Vienna Bread," and an injunction was ordered restraining the defendant from applying the word "Vienna" to baked articles. The argument was advanced by the defendant that the plaintiff could have no exclusive right to the use of the name of the capital of Austria, as a trade-mark. But the court rejected it, saying that as a mark for bread it was purely arbitrary and in no manner descriptive either of the ingredients or quality of the article. No deception was practiced by its use "because the place

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of its manufacture is given and it is known that bread cannot be imported from abroad for use here." In the course of his opinion Judge Van Vorst said:

> "I presume that a baker in Paris or Vienna could manufacture bread there and introduce it under the name of 'New York bread' and use it arbitrarily, and be protected under the laws of their country if he was first to apply 'New York' in such connection."

And where a dentist in St. Louis placed over his office the words "New York Dental Rooms," the court held that he had a proprietary right in the title "New York," as no one would understand that the business was done in the city or state bearing the name used, or that either of those geographical divisions was in any way connected with it. Sanders v. Utt, 16 Mo. App. 322. But the use of the name "Scandinavia" in connection with either the manufacture or the sale of belting does not come within either of these two exceptions.

[4] That geographical names, primarily indicative of place, often acquire a secondary signification indicative of the name of the manufacturer or seller, and the excellence of the thing manufactured or sold, and which enables the manufacturer or seller to assert an exclusive right, is familiar learning supported by a long line of decisions. And that the trade-mark herein involved has acquired such a secondary meaning cannot be disputed upon this record. But the fact that the geographical term has come to have a secondary meaning does not, in the opinion of the court, constitute it a valid trade-mark at common law. The writer understands the law to be that geographical names do not constitute a valid trade-mark at common law unless they have been selected, used, and appropriated under such special circumstances as to point distinctively to origin or ownership. In Baglin v. Cusenier Co., supra, the trade-mark "Chartreuse" was not merely a regional name, but it was peculiarly the designation of the monks (221 U. S. 592, 31 Sup. Ct. 669, 55 L. Ed. 863), and the term pointed to the liqueur manufactured by the monks. This led the court to say that the term as applied to the liqueur could not be regarded in a proper sense as geographical. We may observe in passing that the court in its opinion, written by Mr. Justice Hughes, mentions the fact that it was insisted at the argument that the word did not constitute a valid trade-mark so that at the most the question could be one only of unfair competition. The court did not say that such a conclusion would not follow from such a premise, but denied the premise. If it had denied the conclusion, the claim that a geographical term becomes a valid technical trade-mark at common law when it acquires a secondary meaning indicating origin or ownership would have become the established law so far as the federal courts are concerned, but we are unable to find any such doctrine enunciated in any decision that court has made. In the absence of any such authoritative statement, the court holds that the geographical term "Scandinavia" is an invalid trade-mark at common law as indicating the notion of place and not that of origin and ownership. And see Manitou Springs Mineral Water Co. v. Schueler, 239 Fed. 593, 601, 152 C. C. A. 427.

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[5] The question then arises whether we must regard "Scandinavia" as a geographical term or whether we are at liberty to regard it as having been applied in an arbitrary or fanciful sense and on that ground can sustain it as a valid trade-mark. For a word in common use but applied in an arbitrary or fanciful sense may be a good trade-mark. But in 1887 in a case in England before the Court of Appeal where the question was whether the name of a place, "Melrose," could be registered as a trade-mark, Cotton, L. J., said:

"We were asked by the Attorney General * * * to hold that no geographical expression can come within the description in section 64 * * * as a 'fancy word or words not in common use.' In my opinion that would be wrong. I do not think one could say that no geographical term could possibly be a 'fancy word or words' as applied to a particular article."

He declared that to be a fancy word the word must be one "which obviously cannot have reference to any description or designation of where the article is made or of what character it is." And that it is not enough that it should be shown by evidence that it, in fact, has no such reference, and the incorrect or inappropriate user of a word which is descriptive does not make it a fancy word. "We ought not to consider" he said, "what the result is when that evidence is given, but ought to consider whether, from the name, and from the description of the article to which it is applied, it is obvious, that is to say, whether any ordinary person would understand, that the name could not be intended to designate the place where this was produced." In re Van Duzer's Trade-Mark, L. R. 34 C. D., 623. We think in accordance with the views above expressed that we are not at liberty to regard the term "Scandinavia" as having been used in a fanciful sense, even though it should appear from the evidence that the word was not adopted to signify the place of manufacture, or the place from which the materials were brought, or any process of manufacture peculiar to Scandinavian countries.

[6, 7] It appears, however, that the plaintiff registered the trade-mark under the Act of Congress of February 20, 1905, c. 592, 33 Stat. 724, U. S. Comp. Stat. Ann. 1916, vol. 9, p. 10645. That act does not prescribe what may be valid trade-marks, but simply permits the registration of trade-marks, and such registration in no way validates a trade-mark which was not previously valid, subject to an exception in what is known as the "Ten Years' Clause," which will be considered later. The act provides that "the owner of a trade-mark used in commerce with foreign nations, or among the several states, or with Indian tribes," may obtain registration for such trade-mark by complying with the requirements of the act provided such owner is domiciled in the United States or resides in a foreign country which affords similar privileges to the citizens of the United States. And before considering the effect of this registration we may remark in passing that the use of the word "Scandinavia" as a trade-mark for the particular species of belting manufactured in England by the plaintiff's predecessors did not preclude the protection of the trade-mark in the courts of this country in so far as the goods to which it applied were sold here. In Kidd v. Johnson, 100 U. S. 617, 619, 25 L. Ed. 769, the court de-

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clared that the right to use a trade-mark extends everywhere. And in Hanover Milling Co. v. Metcalf, 240 U. S. 403, 416, 36 Sup. Ct. 357, 60 L. Ed. 713, this doctrine is explained and qualified, and the court cites with approval the following statement made by the court below (208 Fed. 519, 125 C. C. A. 51, L. R. A. 1916D, 136):

"Since it is the trade, and not the mark, that is to be protected, a trade-mark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article."

There is, of course, no question but that the English owner of the trade-mark, if it had not assigned its rights to use it in this country to the complainant, might have registered the trade-mark under the act of Congress, as it had made exclusive use of it in England for almost forty years. But the question is whether the plaintiff was entitled to register it in its own name as owner. The defendant asserts that it had no such right and that it has perpetrated a fraud, in that it represented that it was the owner and failed to disclose its relations with the Scandinavia Company, Limited, of England, which was in fact the owner. The questions now to be considered, therefore, are whether the plaintiff was entitled to register the trade-mark, and, if it was, what is the effect of the registration upon the plaintiff's rights?

[8] The plaintiff and the owners of the trade-mark in England entered into an agreement of May 24, 1904, in which the latter company agreed to sell its belting to the plaintiff at prices which were to be determined from time to time and to no other party in the United States for a period of 10 years. That agreement said nothing as to the trade-mark. A second agreement was entered into between the same parties in May, 1907. The second agreement expressly cancels the contract of May 24, 1904, and provides that the English company "covenants and agrees not to sell, rent or consign its belting to any party, person, firm or corporation other than said second party (the plaintiff herein), for use, rental, sale or resale in the United States of America." It also contains a covenant which reads:

"(5) Said first party (the English company) further covenants and agrees that the said second party shall have the exclusive use in said United States of America of any and all trade-marks and (or) trade-names connected with its belting or used by said first party in the marketing of the same."

And it provided that the agreement should cease and terminate on May 24, 1934. This agreement made in effect the plaintiff the exclusive agent of the English company for the sale of its goods in the United States, and it gave the plaintiff the exclusive use of its trade-mark in this country until 1934. So that the question is whether this made the plaintiff the "owner" of the trade-mark for registration purposes under the statute. In Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, Saxlehner, a resident of Hungary, had agreed with the Apollinaris Company of London that the latter should have the exclusive right to sell Hunyadi water in Great

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Britain and the United States, and the court thought that the agreement did not constitute the company Saxlehner's agent, and that the company had no power to bind Saxlehner by its conduct or its admissions as respects his trade-mark. But the agreement between the Apollinaris Company and Saxlehner differed essentially from the agreement in the case under consideration. In that case no agreement was made as to the trade-mark, and the company reserved the right to cancel the contract upon notice. In this case the right to the exclusive use of the trade-mark in the United States is expressly granted and no right to cancel the contract existed in either party. And in the bill of complaint in this case it is alleged that the plaintiff was the agent for the English company for the sale of its goods in the United States and the agency is conceded. In Saxlehner v. Eisner & Mendelson Co. supra, the plaintiff himself registered his trade-mark in this country as unquestionably he had a right to do. That the English company had the right in this case to transfer for a period of years to the plaintiff whatever right in its trade-mark it possessed, and that the plaintiff could protect its right is clear. Estes v. Williams (C. C.) 21 Fed. 189.

The word "owner" varies in its significance according to context and subject-matter and when found in statutes is "given the widest variety of construction." Peterson v. Johnson, 132 Wis. 280, 282, 111 N. W. 659. In America Woolen Co. v. Town of North Smithfield, 29 R. I. 93, 94, 69 Atl. 293 (16 Ann. Cas. 1227), the court comments on "the versatility of the word to suit the circumstances in which it is used," and declared that the word is not "a technical term, but one of wide application in various connections." In Carter v. Bolster, 122 Mo. App. 135, 141, 98 S. W. 105, 106, the court says:

"The word 'property,' as well as 'owner,' may be used to convey a meaning sometimes broad and sometimes quite restricted. In its general and commonly accepted sense, ownership and property would necessarily imply the power of sale—jus disponendi. * * * Doubtless it may and is frequently used in a more restricted sense."

[9] It is an established rule governing the construction of statutes that they are to have a rational and sensible interpretation. The object which the legislative body sought to attain and the evil which it endeavored to remedy may always be considered to ascertain its intention and to interpret its act. United States v. Ninety-Nine Diamonds, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185. And in Maxwell on the Interpretation of Statutes (4th Ed.) p. 101, the rule is laid down that—

"Even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to it, if fairly susceptible of it."

The exact meaning of the term "owner" as used in the statute under consideration does not appear to have been determined. In Gretsch Mfg. Co. v. Schoening, 6 T. M. Rep. 224 (S. D. N. Y. 1916), Mueller in Germany gave Schoening in the United States the exclusive agency to import and sell the violin strings made in Germany by Mueller and identified by his trade-mark "Eternelle." Schoening registered the

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mark in the United States under the act of 1905 relying upon his agency agreement. The District Judge (Judge Hough) held the registration valid, stating that he perceived no objection to Schoening's registering Mueller's trade-mark as long as Mueller gave to him a monopoly of his (Mueller's) business in America. He said:

"The very object of the contract between Schoening and Mueller was to carve out of Mueller's business a portion thereof and confer it upon Schoening, and it seems to me to necessarily follow from that business arrangement between these two men that when Schoening had the business he had the right to protect it pursuant to the act of 1905."

The lower court entered an order granting a preliminary injunction requiring Schoening to withdraw his notice of ownership of the trade-mark "Eternelle" filed with the Department of the Treasury so far as it applied to violin strings manufactured under that name by Mueller in Germany. That case was brought into this court on appeal. 238 Fed. 780, 151 C. C. A. 630. In affirming that order this court, speaking through Judge Ward, said:

"We assume that Schoening has a valid trade-mark, even if he does not manufacture the strings."

Counsel for plaintiff in the case now under consideration understands from the statement above quoted that this court decided that Schoening had the right to register his trade-mark. In this he is mistaken, for the order entered below was right whether Schoening's registration was valid or invalid, and all that was meant was that, conceding for the purposes of the argument that his trade-mark was valid, the injunction was nevertheless properly ordered to issue against him. But in the case now before us this court holds that one who has the exclusive right to use a trade-mark in the United States has such a special ownership therein as entitles him to its registration during the period of his exclusive use. "Ownership" is the right by which a thing belongs to some one in particular to the exclusion of all others. And the right to the exclusive use of this trade-mark in this country was in this plaintiff for a period of 27 years or 7 years beyond the registration period fixed by the statute. To say that the relation which existed between the English and the American company was that of agency does not help the defendant, for if it be conceded that the relation is that of agency it must also be conceded that it is an agency coupled with an interest, and the right to the exclusive use is one which cannot be withdrawn, and an interest sufficient to prevent revocation is sufficient to make the plaintiff such a special "owner" of the trade-mark as entitled it to register the same under the provisions of the act. To hold that one who has the exclusive right to use a trade-mark has no right to have it registered under the act would be, in our opinion, subversive of the policy and intent of the statute.

If A., the owner of an English trade-mark, assigns the exclusive use of it in the United States for a period of years to B., and C. infringes, the party damaged is B., and he is the party entitled to sue for and to recover the damages, and not A. And we are not prepared to hold that Congress did not intend to give B. the right to protect

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his trade-mark by registration under the act unless we are compelled to that conclusion by the wording of the statute. And as we read the statute we think it was intended that one who has the exclusive use of a trade-mark in this country is the "owner" of the trade-mark for the purposes of registration and protection thereunder during the period within which he has such right to the exclusive use.

It is not necessary to say, and we express no opinion upon the question, whether the English owner of the trade-mark could, if it had elected to do so, have registered this trade-mark at any time during the period within which the right to the exclusive use was in another. But we may call attention to the fact that, if the English owner should make application to register the trade-mark at any time after it had granted the exclusive use to the plaintiff, it would be obliged to file along with its application a written declaration and to verify it stating:

"That no other person, firm, corporation, or association, to the best of the applicant's knowledge and belief has the right to use such trade-mark in the United States, either in the identical form or in such near resemblance thereto as might be calculated to deceive." U. S. Compiled Statutes (Compact Edition) 1918, p. 1533, § 9487.

In concluding this particular phase of the subject we may observe that the English company in its assignment to the plaintiff of the exclusive right to the use of the trade-mark in this country did not in terms restrict its use to goods manufactured by it in England, and that in this court it was argued that the plaintiff had thereby acquired the right to use the mark on belting obtained by it from any source whatever, whether English, French, domestic, or otherwise. Under the law of both countries a trade-mark is not the subject of property except in connection with an existing business. The plaintiff obtained no right in the mark otherwise than with reference to its trade. The right to use the mark in this country was a right to use it as applied to the goods which the plaintiff manufactured or otherwise acquired and sold. The function of the trade-mark being to identify either origin or ownership, it may be that the plaintiff acquired a right to use the mark on any belting it owned, from whatever source obtained. That question is not here and is not decided. If the plaintiff did acquire that right, it would afford a conclusive reason for holding that the plaintiff had such ownership of the trade-mark in the United States as entitled it to its registry.

[10] We come next to consider the effect the registration of the trade-mark has upon the plaintiff's rights. The act contains in section 5 an important provision which reads as follows:

"And provided further, that nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations and among the several states, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this act."

If therefore the plaintiff has shown an actual and exclusive use of the word, for 10 years next preceding the passage of the act, by itself or its predecessors from whom it derived title, the above provi-

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sion would entitle it to the protection of the word "Scandinavia" as a trade-mark without regard to whether it is or not a "merely geographical" term. The purpose of the above proviso, as this court declared in Thaddeus Davids Co. v. Davids, 178 Fed. 801, 102 C. C. A. 249, was to permit the registration of marks not amounting to technical trade-marks where they had been exclusively used as such for more than 10 years prior to the passage of the act and in which the user had thereby acquired property rights. The case was affirmed upon that point in 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046, Ann. Cas. 1915B, 322. See to the same effect Manitou Springs Mineral Water Co. v. Schueler, 239 Fed. 593, 152 C. C. A. 427; Merriam Co. v. Syndicate Publishing Co., 237 U. S. 618, 35 Sup. Ct. 708, 59 L. Ed. 1148; Coca-Cola Co. v. Nashville Syrup Co. (D. C.) 200 Fed. 153; s. c., 200 Fed. 157. The testimony shows that the word "Scandinavia" has been used in this country as a trade-mark upon belting manufactured in England for the plaintiff and its predecessors and sold here under that name in 1892, or for 13 years prior to the passage of the act, and that the sale under that name has been continuous in this country ever since by the plaintiff and its predecessors in title. Paragraph 5 of the bill of complaint avers that in January, 1892, Beach & Co. obtained from the English company "the exclusive agency for the importation and sale" in the United States of the belting manufactured by it, and that it continued "importing and selling such goods under the trade-mark 'Scandinavia' until in or about September 1899." Paragraph 6 avers that in September, 1899 the Beach & Treiber Company "succeeded to the business, good will, and trade-mark rights of said Beach & Co. in the importation and sale of said Scandinavia belting," and that it continuously carried the business on until May 18, 1904. And paragraph 7 avers that the plaintiff "succeeded to the business, good will, and trade-mark rights of the said Beach & Treiber Company pertaining to the importation and sale of the said belting." And there appears in the record a stipulation, signed by counsel for both parties to this suit, that the above averments may be received with the same force and effect as though proven by competent evidence. We are therefore to proceed upon the assumption that competent evidence shows that from 1892 to 1904 the plaintiff's predecessors made use of the word "Scandinavia" as a trade-mark, and that the plaintiff then succeeded to their rights in the use of that word. In what manner the plaintiff succeeded to their rights the paragraphs of the bill agreed to in the stipulation do not disclose, and with that we are not now concerned.

The question then becomes important, whether this use of the word "Scandinavia" in the United States as a trade-mark for 10 years prior to the passage of the act was an exclusive use. The following excerpt from the record gives the testimony of a witness who stated that he had been engaged for 34 years in the manufacture and sale of cotton belting:

"Q. What kind of belting have you known for the past 35 years associated with the name 'Scandinavia'? A. Only one manufacturer used that name.
"Q. Who is that? A. The Scandinavia Belting Company."

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And asked how generally "Scandinavia" belting was known in the United States, he replied that it was known to all users of belting. The plaintiff's manager, being asked whether he had ever heard of any one who prior to the defendant had undertaken to dispute his title to the mark "Scandinavia," answered:

"We only had one case where anybody sold any other belting than 'Scandinavia' under our name (trade-mark), and that was a company in Philadelphia by the name of Osgood, Sayen Company."

That happened, he said, in 1908. That was three years after the passage of the act, and therefore without effect upon the proviso giving a right to registration of a trade-mark exclusively used for ten years prior to the passage of the act. When the attention of the Osgood, Sayen Company was called to their use of the trade-mark, they apologized, said it was a mistake, and discontinued it. And it was not until 1915, 10 years after the act was passed, that the defendant first put on the market its "Scandinavian" brake lining.

The stipulation admits that since 1892 this belting has been imported into the United States by the plaintiff and its predecessors under the trade-name of "Scandinavia," and the record discloses that orders for the belting so imported come "from here and from there and all over the country." The defendant has not contended, and the record would not support the contention if made, that the mark had not been used in commerce with a foreign nation or among the several states for the statutory period. We must therefore hold that as the plaintiff is the "owner" of the trade-mark within the meaning of the Registration Act, and as it and its predecessors from whom it derived title made actual and exclusive use of the word "Scandinavia" as a trade-mark for 10 years, next preceding the passage of the Registration Act, and has been so used in foreign commerce as well as in commerce between the states, and the word has been registered under the act, it is entitled to protection thereunder as a valid trade-mark, without regard to whether it was or not valid at the common law, and prior to its registration.

[11] If we are mistaken in holding that the plaintiff had the right to register the trade-mark as "owner," there is not the slightest ground, in the opinion of the court, for charging the plaintiff with an attempt to defraud the United States or the public because it represented itself as the owner of the trade-mark. A party who acts upon a mistaken view of the law honestly entertained is not guilty of fraud, entitling a party whose own fraud is manifest to defraud the other of that to which in all justice he is entitled. To attribute such a result from such a cause would bring the law itself into disrepute.

[12] In this connection we should perhaps refer to another like ground of defense based on the original adoption of the term "Scandinavia." In Reddaway v. Banham (1896) A. C. 199, 212, Lord Herschell said that where the name of a place precedes the name of an article sold it prima facie means that this is its place of production or manufacture. The plaintiff's belting, however, is not manufactured and never has been manufactured in any of the Scandinavian countries, Ice-

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land, Norway, Sweden, or Denmark. It is manufactured in England and is there marked with the trade-mark "Scandinavia" and shipped to the United States.

The defendant claims that the plaintiff's trade-mark is deceptive, and that no protection will be accorded to a trade-mark which involves a false assertion calculated to deceive the public. It is undoubtedly true that he who comes into equity must come with clean hands. In The Leather Cloth Co., Ltd., v. The American Leather Cloth Co., Ltd., 10 Jurist (N. S.) 81, Lord Chancellor Westbury held that a false statement that goods were made by an American firm and in part at a place in America would bar relief. And in Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706, the Supreme Court declared:

"A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine."

But if a trade-mark is to be invalidated for fraud because of misrepresentation, the representation should have been made with a fraudulent intent or it should at least appear that some one has been defrauded or is likely to be defrauded. We fail to discover any evidence to that effect in this record. In adopting the word "Scandinavia" there was no ulterior purpose to be served and the parties were innocent of all wrongdoing. It does not appear that the original use of the term added anything whatever to the value of the belting sold under that mark. There is nothing in the record which shows that belting of any sort was even manufactured in any Scandinavian country, or of its having any reputation of particular excellence. The use of the term seems originally to have been due to a fanciful or sentimental reason. The history of the trade-mark is that the inventor of the belting which the plaintiff sells as "Scandinavia Belting" was one William Felton, a Scotchman who lived and worked for some years in Sweden. He no doubt was actuated by an honorable purpose in adopting his trade-mark when he commenced the manufacture of the goods in England. That he who comes into equity must come with clean hands is, of course, true. But it is equally true that a court of chancery is open to redress the wrongs of any one who has not himself been guilty of willful misconduct in regard to the matter in litigation, and no willful misconduct is shown on the part of the plaintiff's predecessors in title, or on the part of the plaintiff, in the original adoption or subsequent use of the trade-mark.

[13] The defendant claims that the mark "Scandinavia" having been used in England on belting made by the English manufacturers under a British patent to Cobbett, a predecessor of the Scandinavia Company, Limited, was descriptively used by the patentee and is now publici juris and became so at the expiration of that patent in 1892. The argument seems to be that because the English company owned a patent which supposedly covered its belting and sold such belting under the mark "Scandinavia," ipso facto, all rights in such mark ceased

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when the patent expired and that the mark has ever since been open to the public under the doctrine announced in Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 199, 16 Sup. Ct. 1002, 1014 (41 L. Ed. 118). The doctrine was there stated as follows:

"The result, then, of the American, the English, and the French doctrine universally upheld is this: That where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created."

[14] The doctrine was followed in Merriam Co. v. Syndicate Publishing Co., supra. The doctrine is without application, however, to the facts of the present case. In the Singer Case the patents gave to the Singer Manufacturing Company a substantial monopoly, and the word "Singer" had been adopted by the company as designative of their distinctive style of machines rather than solely indicating the origin of manufacture. So that the word "Singer" came to indicate the class and type of machines that that company made and constituted their generic description. And the court held that on the expiration of the patent the right to make the patented article and to use the generic name passed to the public. The underlying reason upon which the decision rested was the prevention of a perpetuation of the monopoly. Where there has been no patent monopoly, the doctrine does not apply. And in the case at bar there was never any monopoly in the manufacture of the plaintiff's belting. The testimony is that the term "Scandinavia" was not used to indicate a particular weave. There is no proof that the mark was ever used descriptively so as to become a generic or identifying name of the goods. And the evidence shows that both in England and in the United States others were making the same goods and selling them under various trade-marks during the life of the Cobbett patent and long before that patent was applied for. But there is another and conclusive reason why this claim that the name "Scandinavia" became open to the public on the expiration of the patent is of no avail to the defendant, for if it were to be conceded that the doctrine of the Singer Case originally applied the evidence shows that the public did not avail itself of the right, and that now because of the registration of the trade-mark under the 10 years' clause it is not at liberty to violate the plaintiff's exclusive right.

[15] The defendant is charged with unfair competition. The law of unfair competition is broader than is the common law or the statute law of trade-marks, so that one may be entitled to relief on the ground of unfair competition who is denied relief under the law of trade-marks, and that is what happened in the court below. That court granted the plaintiff an injunction, although it held its trade-mark void because the judge concluded the charge of unfair competition was sustained by the evidence. In view of the fact that this court holds the registered trade-mark valid, little need be said as to the unfair competition, although if the court had not sustained the validity of the registered trade-mark we should have found no difficulty in affirming that portion of the decree dealing with the question of unfair com-

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petition. The charge is that the defendant sells in interstate commerce, and under the name "Scandinavian" belting, which is identical in appearance with that which the plaintiff sells under the name "Scandinavia," and that in soliciting sales and in advertising, selling and billing its goods under the name it has adopted it is trading unfairly. The plaintiff's business in its "Scandinavia" belting last year is shown to have amounted to about $700,000. The treasurer of the company testified that in his opinion its trade-mark is worth to the company at least $500,000, and that the plaintiff expends something like $200,000 a year for the creation and upkeep of the good will that is crystallized in the trade-mark. The defendant commenced its business in 1906, and in 1908 it began selling brake lining similar to the plaintiff's in that it was solid woven. This, of course, it was entitled to do, and it put its product on the market under the trade-mark "Raybestos." In a short time it put on the market a solid woven asbestos brake lining like the plaintiff's under the trade-mark of "Motobestos." This also it had a right to do. Then in 1914 it put on the market a solid woven brake lining under the name "Scandinavian." The plaintiff had been selling under the name "Scandinavia" its solid woven brake lining for Ford cars, and for the cars of other manufacturers, selling to the Ford Automobile Company alone 1,925,000 feet in 1914. The president of the defendant company testified that before he put on the market this "Scandinavian" brake lining he recognized that there was a demand in the trade for the plaintiff's "Scandinavia" brake lining, and that he adopted the designation to sell his brake lining for Ford cars which the plaintiff had been furnishing, and that he visited and solicited orders from the same trade the plaintiff had supplied. The following excerpt from the record is illuminating:

"Q. Did anybody ever inquire of you for 'Scandinavia' lining before you began to use this name? A. Oh, yes; we had numbers of inquiries if we could make a brake lining somewhat on the same order as the 'Scandinavia' lining made by the 'Scandinavia' Belting Company and we said we would try."

That the defendant intended to appropriate the plaintiff's trade by a fraudulent use of the plaintiff's trade-mark is so clear that no one reading the evidence, it seems to us, can doubt it. It adopted the trade-mark "Scandinavian" for no other purpose than to obtain an unfair and fraudulent share of the plaintiff's business, knowing that its use of the trade-mark would mislead the public into the belief that in purchasing the "Scandinavian" product it was obtaining the "Scandinavia" brake lining of the plaintiff. It copied the plaintiff's goods. This, as we have said, it had a right to do. But when it copied the plaintiff's trade-mark, simply changing a substantive into an adjective, it failed to take into account the powers of a court of equity whose highest office it has always been to thwart fraud and to compel the fruits of fraud to be restored to the party defrauded. That the trade-mark is infringed goes without saying.

[16, 17] But the objection had been made that the record does not disclose any loss of sales to the plaintiff or that any one has been actually deceived by what the defendant has done. The objection is

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without merit. It is without merit because, if the plaintiff used a trade-mark to distinguish its goods, neither the defendant nor anybody else has a right to use that mark upon the goods which he sells. As James, L. J., said in Singer Manufacturing Company, 2 Ch. Div. (L. R. 1875–76) 434, although as between the first vendor and the purchaser there may be no fraud, the mark is capable of being used for the purpose of fraud afterwards. To prevent the fraud at once the law does not allow the defendant to put the plaintiff's mark upon its goods. That is the rule in the case of a trade-mark. When it is not the case of a trade-mark, then ordinarily actual fraud must be shown. But even in unfair competition cases the simulation of the well-known and distinctive features of one's goods may be so close that the court will assume an intent to defraud. This court so declared in Enterprise Mfg. Co. v. Landers, Frary & Clark, 131 Fed. 240, 65 C. C. A. 587. And see Collinsplatt v. Finlayson (C. C.) 88 Fed. 693.

So much of the decree as dismissed the cause of action as to the registered trade-mark is reversed, with directions to reinstate the same and sustain the trade-mark. As thus modified, the decree is affirmed, with the costs in both courts to plaintiff-appellant.

WARD, Circuit Judge (concurring). The relation between the English company which manufactures the belting and the plaintiff company which has the exclusive right to sell it in the United States is described throughout the record as an agency. The proof, however, as to the nature of this agency, is so vague that I think it worth while to say something on the subject.

If the plaintiff company is merely the exclusive agent of the English company to sell its product in this country for its benefit upon a fixed commission or for any sum it can get in excess of a fixed price, I think the English company is the owner, both of the trade-mark and of the business to be protected, and is alone entitled to register the trade-mark under the United States statute and to sue for infringement of it or for unfair competition in business here. On this state of facts, the bill should be dismissed.

On the other hand, if the plaintiff company purchases the English company's product outright and sells it for its own benefit, and is given the exclusive right to do so in this country, together with the right to use the trade-mark for that purpose which has come to indicate the plaintiff company as the source and origin of the goods, then the business to be protected is the plaintiff company's business, and it has the right to register the trade-mark under the United States statute and to sue for infringement of it or for unfair competition in business here. Because I assume this to be the true relation between the English and the plaintiff company, I concur in the judgment of the court.

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(257 Fed. 963)

BOONE v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. March 8, 1919. Rehearing Denied April 28, 1919.)

No. 4912.

1. INDICTMENT AND INFORMATION ⟸125(19)—OFFENSES BY OFFICERS OF NATIONAL BANK—MAKING FALSE REPORT.
An indictment against an officer of a national bank, under Rev. St. § 5209 (Comp. St. § 9772), for making a false entry in a report, is not duplicitous because it charges that the entry was made with intent to injure and defraud the bank and to deceive the Comptroller of the Currency and any agent appointed to examine the affairs of the bank.

2. BANKS AND BANKING ⟸257(1)—OFFENSES BY OFFICERS OF NATIONAL BANKS—INDICTMENT.
An indictment against the president of a national bank *held* to properly charge him, not as principal, but as accessory to the making of a false entry in a report to the Comptroller, in that he abetted, aided, counseled, and procured such entry to be made by the cashier.

3. BANKS AND BANKING ⟸257(3)—OFFENSES BY OFFICERS OF NATIONAL BANK—TRIAL—EVIDENCE.
On trial of the president of a national bank, charged with aiding and abetting the making of false reports to the Comptroller, evidence of the condition of his account and his indebtedness to the bank, although as it stood at a later date than the reports, *held* admissible.

4. BANKS AND BANKING ⟸257(4)—OFFENSES BY OFFICERS OF NATIONAL BANK—TRIAL—SUFFICIENCY OF EVIDENCE.
Evidence on trial of the president of a national bank for violation of the statute *held* sufficient to require submission of the case to the jury.

5. CRIMINAL LAW ⟸1186(1)—REVERSAL—SUFFICIENCY OF EVIDENCE.
That the evidence in support of the charges in certain counts of an indictment, on which defendant was acquitted, was stronger than that under the single count, on which he was convicted, is not ground for reversal.

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Criminal prosecution by the United States against T. W. M. Boone. Judgment of conviction, and defendant brings error. Affirmed.

Joseph M. Hill, of Ft. Smith, Ark. (Henry L. Fitzhugh and John Brizzolara, both of Ft. Smith, Ark., and Jeptha H. Evans, of Boonville, Ark., on the brief), for plaintiff in error.

J. V. Bourland, of Ft. Smith, Ark. (Emon O. Mahony, U. S. Atty., of El Dorado, Ark., on the brief), for the United States.

Before SANBORN and HOOK, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The plaintiff in error, hereinafter referred to as the defendant, was indicted with three other officers of the American National Bank, of which he had been president, for violations of section 5209, Rev. St. (Comp. St. § 9772). There were nine counts in the indictment. On the first eight the jury returned a verdict

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

 *Certiorari denied 250 U. S. —, 39 Sup. Ct. 495, 63 L. Ed. —.

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of not guilty, and a verdict of guilty on the ninth count. It is therefore only necessary to pass on this one count. That count charges:

"And the grand jurors aforesaid, inquiring as aforesaid, upon their said oaths, do further present that the said P. A. Ball, heretofore, to wit, on the 29th day of June, 1915, in the division and district aforesaid, the said P. A. Ball being then and there the said cashier of the American National Bank of Ft. Smith, Ark., and which said bank was established and then existing and doing business as a bank, under and by virtue of the national banking laws of the United States, unlawfully, willfully, and feloniously did make, in a certain report of the condition of the affairs of the said bank at the close of business on, to wit, the 23d day of June, 1915 (which said report then and there purported to be made to the Comptroller of the Currency of the United States, in accordance with section 5211 of the Revised Statutes of the United States[1]), a certain other false entry under a certain head designated in said report as 'Resources' and opposite items '16' and '17' therein, to wit, 'Lawful Money Reserve in Bank,' and in column therein headed 'Dollars Cts.,' which said false entry was and is in figures following, to-wit:

"'34 179 35
15 000 00'

—and which said entry so made then and there purported to show, and did in substance, intent, and effect state and declare, that the lawful money reserve in said bank was in the sum of $49,179.35; and the grand jurors aforesaid further say that the entry was and is false in this, to wit, that the lawful money reserve in said bank was not $49,179.35, but was a much less sum, to wit, the sum of $29,179.35; and the grand jurors aforesaid do further say that the said P. A. Ball, cashier as aforesaid, then and there, at the time and place of making said false entry in said report as aforesaid, well knowing the said entry to be then and there false as aforesaid, thereby intended to injure and defraud the said bank, and to deceive the said Comptroller of the Currency and any agent appointed by said Comptroller to examine, and in any examination by said Comptroller, and agent so appointed, of the affairs of said bank—contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

"And the grand jurors, upon their oaths, do further present that the said T. W. M. Boone, being then and there president, and the said A. S. Dowd and the said F. M. Dickenson, being assistant cashiers of said bank, heretofore, to wit, at divers and sundry times before and on the said 29th day of June, 1915, in the said city of Ft. Smith, Ark., within the jurisdiction of said court, unlawfully, willfully, and feloniously, and with intent to injure and defraud said bank, and to deceive the said Comptroller, and any agent by him thereunto appointed, in examining the affairs of said bank, did aid, abet, incite, counsel, and procure the said P. A. Ball, cashier as aforesaid, to make said false entry in manner and form as aforesaid, to do and commit—contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States."

There was a demurrer to each count of the indictment. That relating to the ninth count assigns two grounds—the first, that it is duplicitous, in charging two separate and distinct offenses, to wit, the offense of making a false entry in a report with the intent to injure and defraud the bank and of making the false entry in the report with the intent to deceive the Comptroller of the Currency and any agent appointed by him to examine the affairs of the bank; second, that the allegations in the indictment charged the defendant with being an accessory, and the allegations show that, if he were guilty of any offense, it would be that of principal and not that of an accessory. The demurrer having been overruled, the defendant at the beginning of the trial

[1] U. S. Comp. St. 9774.

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objected to the introduction of any evidence upon the ground that the indictment did not charge a public offense, which objection was by the court overruled. After rendition of the verdict, motions in arrest of judgment and for a new trial were filed and overruled. Proper exceptions to these rulings of the court were saved and are assigned as errors in the assignment of errors.

It has been repeatedly held by this court that the practice of objecting to the introduction of evidence upon the ground that the indictment or complaint fails to state a cause of action does not prevail in the courts of the United States, either in civil or criminal causes, except under circumstances of an extraordinary nature. Morris v. United States, 161 Fed. 672, 678, 88 C. C. A. 532, 538; United Kansas Portland Cement Co. v. Harvey, 216 Fed. 316, 132 C. C. A. 460; McSpadden v. United States, 224 Fed. 935, 140 C. C. A. 413; Estes v. United States, 227 Fed. 818, 142 C. C. A. 342; McKnight v. United States, 252 Fed. 687, 164 C. C. A. 527.

[1] Is this count of the indictment duplicitous by reason of the allegations that the false entry in the report was made with the intent to injure and defraud the bank and to deceive the Comptroller of the Currency, or any agent appointed to examine the affairs of the bank?

Counsel rely on what they presume was decided by Judge Adams, speaking for this court, in Billingsley v. United States, 178 Fed. 653, 101 C. C. A. 465, and United States v. Norton (D. C.) 188 Fed. 256, decided by Judge Campbell, who was of the opinion that the Billingsley Case sustained the contention now made.

A careful reading of Judge Adams' opinion does not warrant this construction. The issue in that case was whether the indictment charging a false entry in the books of the bank, with the intent to deceive any agent appointed to examine the affairs of the bank, without charging that the false entry was made with the intent to defraud the association, or any other bank or person, was sufficient to charge an offense. The court held the indictment sufficient, saying:

"There are apparently two separate intents contemplated by this section, either of which, when accompanying a forbidden act, constitutes an offense."

It was not held that the making of a false entry to defraud and to deceive constituted separate offenses. The intents were separate, but they might both concur in the making of a single false entry and thereby constitute a single crime. That allegations in an indictment charging both intents in one count are not duplicitous has been decided in McKnight v. United States, 97 Fed. 208, 215, 38 C. C. A. 115, 123, in which the opinion was delivered by Judge (now Mr. Justice) Day, and was concurred in by Judge (later Mr. Justice) Lurton and Circuit Judge Taft. In United States v. Britton, 107 U. S. 655, 665, 2 Sup. Ct. 512, 27 L. Ed. 520, a count charging the acts of the defendant to have been with the intent to injure and defraud the said association and certain persons to the grand jurors unknown was held good and not duplicitous. The same conclusion was reached in Morse v. United States, 174 Fed. 539, 548, 98 C. C. A. 321, in Richardson v. United States, 181 Fed. 1, 8, 104 C. C. A. 69, and in effect in United States v. Corbett, 215 U. S. 233, 30 Sup. Ct. 81, 54 L. Ed. 173.

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In Crain v. United States, 162 U. S. 625, 636, 16 Sup. Ct. 952, 40 L. Ed. 1097, a similar question was before the court. A count in the indictment charged three acts, made separate offenses by section 5421, Rev. St. (Comp. St. § 10193), and it was held that a motion in arrest of judgment on that count, on the ground of duplicity, was properly denied. The court said:

"We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute."

The general rule is that in a criminal pleading, when the statute makes either of two or more distinct acts connected with a more general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when committed by different persons or at different times, they may, when committed by the same person at the same time be coupled in one count as constituting one offense. Lehman v. United States, 127 Fed. 41, 45, 61 C. C. A. 577; May v. United States, 199 Fed. 53, 117 C. C. A. 431; Clark v. United States, 211 Fed. 916, 918, 128 C. C. A. 294, 296; Glass v. United States, 222 Fed. 773, 138 C. C. A. 321.

Another ground urged is that the indictment, after charging the making of the report of the condition of the bank, inserted in parenthesis these words:

"(Which said report then and there purported to be made to the Comptroller of the Currency of the United States, etc.)."

It is claimed that this count fails to charge that the report was made to the Comptroller of the Currency, but only that it purported to be made. What the pleader of the count meant was that the report, being false, only purported to be a report. In what manner this tended to the prejudice of the defendant we cannot conceive. It is therefore clearly within the provisions of section 1025 Rev. St. (Comp. St. § 1691). The court committed no error in overruling the demurrer or the motion in arrest of judgment.

[2] Nor is this count defective for charging the defendant as an accessory, instead of a principal. The report was made by the cashier of the bank, and the indictment charges the defendant to have abetted, aided, counseled, and procured the said P. A. Ball, cashier as aforesaid, to make said false entry, etc. As the defendant did not make the report, he could only be held responsible if he aided and abetted the person who made it.

[3] It is next claimed that the court erred in the admission as evidence statements made by the defendant to Mr. Machen in relation to matters existing at a later date than any of the reports charged to have been false. These statements relate to large loans to and overdrafts by the defendant, and corporations and firms in which the defendant was interested, which existed at a later date than any of the alleged false reports set out in the indictment. The court in overruling the objections to this testimony, said:

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"I think this particular testimony is within the boundaries of that rule. It tends to show the knowledge which Mr. Boone had at that time; the knowledge that he had, and at least forms a starting point to go backwards over the period covered by this indictment. I believe it is within the field of collateral facts that may be properly introduced."

It must not be overlooked that the defendant is not charged with having made these reports, but to have aided, abetted, incited, and counseled P. A. Ball, the cashier of the bank, of which the defendant was president, to make these false reports. It was therefore essential to prove his knowledge of the falsity of the reports, and his intent to deceive the Comptroller. Besides, the defendant was tried on all nine counts of the indictment, some of which charged the falsity of the reports to consist in the failure to report defendant's overdrafts. There was no error in admitting this testimony. In Allis v. United States, 155 U. S. 117, 119, 15 Sup. Ct. 36, 37 (39 L. Ed. 91), a similar question was before the court, and it was held:

"There are two sufficient answers to these objections: (1) While the defendant was found guilty only on one, he was being tried on 25 counts, which counts charged false entries at different times running from February to December, and therefore testimony was competent as to the condition of his account stretching through the entire time. (2) The gravamen of this offense is the false entry with intent to injure, defraud, or deceive, and it was competent to show the state of the defendant's account, not merely at the very day the false entry was made, but also before and after that date, for the purpose of throwing light on the intent with which it was made."

The authorities that such evidence is admissible for the purpose of proving the intent of the defendant, where intent is an essential ingredient of the charge are practically uniform. Alexander v. United States, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954; Clune v. United States, 159 U. S. 593, 16 Sup. Ct. 125, 40 L. Ed. 269; Spurr v. United States, 87 Fed. 701, 710, 31 C. C. A. 202. In Moffatt v. United States, 232 Fed. 522, 533, 146 C. C. A. 480, 491, this court, after saying that "the intent with which an accused does a subsequent act cannot be imputed to him as of the prior date of the crime charged," proceeds by holding:

"These rules, however, do not conflict with or impair the long-established doctrine that in cases involving fraud, or the intent with which an accused does an act, collateral facts and circumstances, and his other acts of a kindred character, both prior and subsequent, not too remote in time, are admissible in evidence."

A large number of special instructions were asked in behalf of the defendant and by the court refused. Some of them referred to the counts on which the defendant was acquitted, and therefore are not involved on this writ of error. Those relating to the ninth count were all included in the charge of the court, although not in the language of the requested instructions. This is not necessary. One of the requests was for a directed verdict of not guilty, on this as well as the other eight counts. This makes it necessary to determine whether there was substantial evidence to warrant the submission of the case to the jury on this count.

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[4, 5] In view of the fact that the defendant's liberty is involved, we have read and reread the testimony, and without prolonging this opinion by setting it out herein, which can serve no useful purpose in determining any question of law, we are of the opinion that there was ample and substantial evidence to make it the duty of the court to submit it to the jury. It is true, as claimed by counsel, that the evidence as to some of the other counts, especially the sixth and eighth, on which the defendant was acquitted, is stronger against the defendant than that on this count; but it was for the jury to determine on what counts, if any, the defendant should be found guilty, and he certainly cannot complain of not having been found guilty on these counts. It is a well-known fact that juries frequently hesitate to return verdicts of guilty on a large number of counts, when the punishment which may be imposed on each count is as severe as that provided for violations of this statute (the minimum punishment on each count is five years). They therefore satisfy their consciences by a verdict of guilty on one or two counts, and not always on the counts supported by the strongest evidence.

There was a motion for a new trial on the usual grounds, and also upon the ground that the jurors were improperly influenced by newspaper articles, highly prejudicial to the defendants. Motions for a new trial are addressed to the sound discretion of the trial court, and are not the subject of an assignment of error. The newspaper articles complained of were no doubt of an inflammatory nature, and if the evidence had shown that they were read by the jurors, or any of them, the trial court would have been justified to have set the verdict aside. But a careful reading of the evidence, some of which was by ex parte affidavits, and a great deal of it by witnesses appearing in court and testifying orally, satisfies us that the finding of the court that none of the jurors had read the articles is fully sustained. Counsel in their brief say:

"The jurors were kept together and quarters for them provided at the Hotel Goldman in the city of Ft. Smith. They were placed in rooms connecting with each other, and the marshal's room in an entry that had no other rooms than those occupied by the jurors and the marshal. The telephones of all the rooms were disconnected, except the one in the marshal's room. These most excellent precautions were taken to prevent improper influences reaching the jury, and the trial judge carefully guarded the rights of the defendant in this particular, and we believe that the marshal in his instructions to his deputies carefully did likewise."

We find there was no prejudicial error in the trial of this case, and the judgment is therefore affirmed.

SANBORN, Circuit Judge (dissenting). A careful examination of the record in this case has forced my mind to the conclusion that there is no substantial evidence in it that Boone was guilty of the offense of which he was convicted, so that I am unable to consent to an affirmance of the judgment against him which sentenced him to the penitentiary for seven years. Reduced to its lowest terms, this is the case the record presents, as I understand it: Boone was the president and Ball the cashier of the bank. Ball was indicted for making the false

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entries charged in the indictment, and Boone for aiding and abetting him; but Ball was not prosecuted, but was called by the United States and testified on its behalf that he had frequently embezzled funds of the bank and had made false entries in the books and reports to the Comptroller without Boone's knowledge. Ball testified that he had an understanding or agreement with Boone that, when the cash was low in the bank, it should be boosted by false entries in the books of the bank, and that in two instances, relating respectively to Byllesby & Co.'s and Bontty's notes specified in two specific counts in the indictment, Boone conferred and agreed with him that entries of payments of them in cash should be made in the bank books when the notes had not been paid, and that Ball made the entries. Ball then testified that he could not remember of any other instances in which he and Boone conferred about any false entries. Boone testified that he never had had any understanding with Ball that when the cash was low it should be boosted by false entries in the books of the bank, that he never conferred or agreed with Ball that the false entries which Ball made regarding payment in the cases of the Byllesby & Co.'s and Bontty's notes should be made, and that he never aided or abetted Ball in making the false entries in the books or reports concerning which he was indicted, nor did he ever have any notice or knowledge before the bank failed, of any of the false entries in the books of the bank or in the Comptroller's reports which were charged in any of the nine counts of the indictment against Ball and him. This was all the evidence there was upon the question whether or not Boone had aided or abetted Ball in making the false entries in the Comptroller's report charged in the ninth count of the indictment. There was other evidence from various witnesses regarding the other eight counts. The evidence upon the nine counts was submitted to the jury, which returned a verdict in Boone's favor on all the counts, except the ninth, thereby finding as to each of the eight counts that Ball's testimony was false and Boone's was true, and necessarily finding that Ball's testimony was false and Boone's was true regarding the entries concerning the Byllesby & Co.'s and Bontty's notes, which were the only entries that Ball testified that Boone conferred with him about.

The result is, as I read the record, that on the question of substantial evidence to sustain the verdict upon the specific charge in the ninth count, which is that Boone aided and abetted Ball in making a false entry of $49,179.35, when he should have made a true entry of $29,179.35, in the report to the Comptroller of the 29th day of June, 1915, this is the case: Boone testified that he had no knowledge of this entry or its falsity, and that he never aided or abetted Ball in making it. Ball testified that he made it, that he had an understanding or agreement with Boone that when the cash was low in the bank it should be boosted by entries in the books of the bank, but that he could not remember that he ever had any conference, understanding, or agreement with Ball about this entry in the report to the Comptroller, which, of course, is not an entry in any of the books of the bank. Boone testified that he never had any understanding or agreement with Ball about making any false entries in books, or reports, or elsewhere. Upon that issue, wheth-

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er or not there was such an agreement or understanding, the jury has found upon the other eight counts, and has necessarily specifically found upon the two counts regarding the Byllesby & Co.'s and Bontty's notes, that Ball was mistaken and Boone was right.

Because in my opinion this record presents a case in which there was no substantial evidence that Boone was guilty of the offense charged in the ninth count of the indictment, of which he was convicted, and because the conclusion that he was so guilty is utterly inconsistent with the findings of the jury on the other eight counts, I cannot resist the conclusion that the judgment below should be reversed.

(257 Fed. 970)

FELLOWS v. NATIONAL CAN CO.*

(Circuit Court of Appeals, Sixth Circuit. April 8, 1919.)

No. 3207.

1. DAMAGES ⟸82—LIQUIDATED DAMAGES OR PENALTY—BREACH OF CONTRACT.
In a contract for lease of machines, a provision that on failure to pay rent by the 10th of each month for the preceding month it should be increased 10 per cent, *held* void, as for a penalty.

2. PATENTS ⟸216—LEASE OF MACHINES—ROYALTY—PROVISION FOR MINIMUM.
In a contract for leasing solder-saving machines, providing for the payment as rental of one-third the saving of the machines each month, a provision immediately following, "But the minimum amount of rent or royalty paid in any calendar year, after the year in which the machines are installed, shall be $300 for each machine," *held* not ambiguous, and reasonable and valid; it being shown that, if a machine was continuously used, the royalty would much exceed such sum.

3. ESTOPPEL ⟸70(2)—EQUITABLE ESTOPPEL —DELAY IN ASSERTING RIGHTS.
Where a lease of machines for a term of years, subject to their return at any time by lessee, provided for payment of rental monthly on a royalty basis, but contained a plain and unambiguous provision fixing a minimum annual rental for each machine, and each party had a copy of the contract, neither the failure to demand the annual minimum at the end of each year, nor the acceptance of monthly rentals thereafter, estopped lessor to demand the deficiency on termination of the contract by lessee.

4. ESTOPPEL ⟸54—EQUITABLE ESTOPPEL—EQUAL KNOWLEDGE OF FACTS.
Where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.

5. LIMITATION OF ACTIONS ⟸46(6)—ACCRUAL OF RIGHT OF ACTION—CONTINUING CONTRACT.
Where a lease of machines for a term of years provided for monthly rental on a royalty basis, but fixed a minimum annual rental for each machine, without stating when any deficiency should be payable, a cause of action for such a deficiency arose on the lapse of a reasonable time after expiration of the year, and from that time limitation ran against an action therefor.

6. PATENTS ⟸216—LEASE OF MACHINES—CONSTRUCTION—RENTAL.
Contract for leasing of machines on royalty, with a fixed minimum annual rental for each machine, construed with respect to rental due on machines for the year in which they were returned under the contract.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 250 U. S. 662, 40 Sup. Ct. 11, 64 L. Ed. —.

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Action at law by Olin S. Fellows against the National Can Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. H. Foucar, of Chicago, Ill., for plaintiff in error.
N. Calvin Bigelow, of Detroit, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On July 6, 1905, plaintiff in error (plaintiff below) leased to defendant, in writing, eight of plaintiff's patented solder-saving machines and their respective accessories and supplies, at a rental (subject to a minimum hereinafter stated) of one-third of the value of the solder saved by the machines (100 pounds of "solder savings" being taken as equal in value to 95 pounds of original solder), during the life of either of the patents thereon (the last of which would expire in 1920); the lessee having, however, the absolute right to cancel the lease at any time by returning to plaintiff the machines and their supplies. Payment of rental for each month, accompanied by written returns of the number of cans treated and the solder saved, were to be made to plaintiff within the first 10 days of the following month, with express provision that the minimum amount of rent in any one calendar year (after the year in which the machines should be installed) should be $300 for each machine. There was further provision for an increase of 10 per cent. each month upon the amount of rentals due in case of failure to make payment within the required time. Four machines had been installed under a former contract, which was superseded by the one in suit. These were retained under the new contract, and two more were received by defendant by or about January 1, 1906. The remaining two machines called for by the contract were never installed or asked for, and they are not involved in the claims of either party. Four of the machines were surrendered by defendant during 1909, and the remaining two in 1913. Monthly payments (without reference to the annual minimum) were made by defendant during the time the respective machines were in its possession, aggregating for 1906 $580.56, for 1907 $511.53, for 1908 $1,117.41, for 1909 $412.03, for 1910 $61.25, for 1911 $130 and for 1913 $116.17—a total of $2,929.05. In July, 1908, on defendant's representation that the 5 per cent. shrinkage in solder savings was less than actual experience, it was agreed (and carried out) that settlements thereafter should be upon a 90 per cent. basis, instead of 95 per cent.

In 1914, after the last machine was returned, plaintiff for the first time called on defendant for payment of the annual minimum rental of $300 per machine, less the $2,929.05 actually paid on monthly statements of savings; the claimed deficiency being $6,670.95, exclusive of interest. This suit, brought June 14, 1915, is to recover the amount of that deficiency, together with the 10 per cent. increase for failure to make payments when due, amounting to the further sum of $14,482.41, exclusive of interest thereon.

Defendant pleaded that the 10 per cent. clause was void and unenforceable, that the suit was entirely barred by limitation, that the 1908

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savings percentage arrangement amounted to a novation, that the rental payments were made and received in full settlement and satisfaction of defendant's now asserted liability, and that by such acceptance of such payments plaintiff waived the claims now made and is estopped to assert them. On the trial, the petition was amended to allege fraud in procuring the contract.

The trial judge held that the statute of limitations did not apply, that the 10 per cent. provision was void as a penalty, and (a jury having been waived), while declining to hold that the contract was obtained by plaintiff's fraud, held that the minimum provision was ambiguous, concluding from its language, the statements of the parties prior to and at the time of its making, and by their dealings thereafter, that it should be construed as merely giving plaintiff the right to cancel the contract for failure to make the one-third net savings equal $300 per year. In that connection the court found as facts that while (a) the plaintiff himself always believed that he was entitled by the strict terms of the contract to the minimum annual rental, yet (b) that defendant supposed it was required to make only the monthly payments of one-third of the solder savings, and that, had it thought itself liable for the annual minimum rental, it would not have signed the contract in the first instance, or, having signed it, would have returned the machines and canceled the contract; (c) that plaintiff represented to defendant, at the time the lease was signed, that under the contract "there were savings certain to result to defendant, and that the terms of the contract were such that it could not result in any loss to defendant, because it provided only for a rental to be measured by a portion of the savings of solder"; (d) that plaintiff knew that defendant would cancel the contract if he asserted the minimum provision, knew that defendant believed all rentals claimed were being settled in full each month, knew that defendant was retaining the machines under such belief, and intended that defendant should so believe. The judge concluded, as matter of law, that plaintiff was thereby estopped from recovering.

[1] 1. The District Judge was clearly right in denying relief under the clause for an increase of 10 per cent. per month. If regarded as interest, the provision was usurious and void under the applicable Michigan law. If intended as stipulated damages, it was under the present case equally void. In the normal case, damages for delay in payment of money are measured by interest. Assuming, however, that it was competent for the parties to agree upon a higher measure, it is clear that the provision in question bears no relation whatever to actual compensation or actual damages, and was thus a mere penalty and void. Manhattan Life Ins. Co. v. Wright (C. C. A. 8) 126 Fed. 82, 85, 61 C. C. A. 138; McCall v. Deuchler (C. C. A. 8) 174 Fed. 133, 98 C. C. A. 169.

2. The District Judge was right in not holding that the contract was obtained by fraud; actual fraud would not be the natural inference from the record. There was no dispute in the testimony as to what was actually said and done by the parties throughout their relations, both before and after the contract was made. The trial judge thought

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the witnesses on both sides testified truthfully. Plaintiff was the only witness on his side; defendant had but two witnesses.

The contract which the one in suit superseded contained the same annual minimum provision; there is no testimony that this previous contract was not read over by defendant; on the contrary, its sales manager who signed it (at the manager's direction), while not remembering reading it over, or that anything was said about the annual minimum when the contract was signed, "infers" that he read it over. It was on a printed form; the minimum provision immediately followed the solder-savings provision and in the same type; it was signed for plaintiff by his agent, who procured it; a copy was retained by defendant, which attached thereto plaintiff's letter, stating his agent's report that the contract was closed, and advising defendant of the ordering of four machines and their equipment. Defendant's manager says he signed the new contract without reading it, and did not recall the signing of the earlier contract. The only reason assigned for making the new contract is that the former one called for but four machines, while the new one contemplated eight.

The only differences between the two contracts relate to the number of machines and the ratio of original solder to solder savings, which was 97 to 100 in the former, as compared to 95 to 100 in the later contract. Plaintiff did not remember calling defendant's attention to the minimum clause, and admits that, when the later contract was signed, he told defendant's manager "the saving capacity of the machines, and that he would be expected to pay him one-third of the value of the savings." Plaintiff testified, however, that he "certainly supposed they (defendant's representatives) had read the contract and knew" its conditions. We find nothing in the record discrediting this statement of plaintiff's belief. The testimony which comes nearest to sustaining the charge of fraud is that of defendant's manager, who says that when the later contract was signed "there was no further talk than the percentage basis. My recollection is that it was one-third and two-thirds. He did not state anything at any time about any compensation to be paid to him for the use of these machines other than the percentage basis," and, in another connection, that at one time (possibly before the earlier contract was signed) plaintiff told him with reference to the saving of solder by the use of his machines that "he got a certain percentage, and we would get a certain percentage, and there was no chance of losing. He never said anything to me in these conversations with reference to a contract in which there was a minimum clause of $300 per year minimum per machine."

There is no room for more than mere suspicion of fraud in the fact that in September, 1905, two months after the contract was made (but to which year the annual minimum did not apply), plaintiff in a letter offering to help in getting the machinery to work properly said, "I am interested in your making cans, as otherwise I get no returns, and possibly my experience might be of use to you;" nor by the fact that in July, 1906, a year after the contract in question was made, but about six months before an annual minimum would be payable (if ever) he wrote, "I trust that you will soon install this machine for I think it

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would mean considerable saving to you, and your returns to me are so small that I would very much appreciate this increase." If defendant could not make the machines already installed work, or did not use them, it would naturally return them, and the more machines defendant installed the more returns plaintiff would get; he was, moreover, interested in getting more than the minimum annual rental. The testimony, taken together, falls short of proving fraud in the making of the contract. On the trial, plaintiff's counsel stated that "the kind of fraud we complain of is more of a fraud which has taken place after the entering into the contract."

3. We see no merit in the contention (not passed upon below) that the 1908 solder ratio change amounted to a novation. It had no relation to the wholly separable annual minimum feature, and concerned solely the monthly solder-saving provision, which has been fully carried out. Nor do we see any merit in the claim that the statute of limitations has barred recovery under the minimum provision as to all the years in question.

[2] 4. That the annual minimum provision was originally valid, in the absence of fraud in its procurement, is not open to question. It was a reasonable provision. There was undisputed testimony that during the year 1905 and the two following years plaintiff had about 15 to 20 contracts in force, all on practically the same form of blanks and covering about 50 or 60 machines, and that his share of the earnings of these machines, on the same one-third basis, averaged very much in excess of the $300 annual minimum (in one case a machine saved $1,800 in one month); and defendant's manager testified that, had its factory been run to full capacity, it could have turned out 20 times as many cans as it did, that there was demand for cans of that kind, and that defendant's failure to get more orders was due to its inability to meet competition, and that for this reason the machines in question were operated but a small part of the time. The machines were sent back because defendant discontinued the lines they were used on. The annual minimum provision was thus but a reasonable means of assuring the largest available use of the machines.

We cannot agree with the learned district judge that it is ambiguous. It immediately follows the provision for a solder-saving rental, and is in this language, "but the minimum amount of rent or royalty paid in any calendar year, after the year in which the machines are installed, shall be $300 for each machine." Taken in connection with what precedes, it unmistakably requires defendant to pay ultimately at least $300 per year for each machine. The earlier requirement of monthly payment on the basis of solder saving creates no ambiguity respecting defendant's obligation under the minimum provision, because until the calendar year was closed, and the last monthly report was in, it could not be known that the minimum for the year had not been reached, and therefore it could in no case be called for as such until after the close of the calendar year. Nor does the question whether the penalty of 10 per cent. monthly increase for nonpayment of rent when due was meant to apply to the annual minimum payment create any ambiguity respecting defendant's obligation to pay that

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minimum. It results that it was error to admit parol testimony in aid of the construction of the minimum provision, and that the interpretation placed by the District Court upon that provision is not maintainable.

Whether the judgment below shall stand depends upon the effect of plaintiff's acceptance of the monthly solder-savings payments and his nonclaim of the annual minimum when due, as either amounting to payment or working an estoppel.

That the acceptance of the monthly payments did not amount to present payment and satisfaction of the annual minimum is plain. All payments seem to have been made by check, each of which was accompanied by a statement on a printed blank (presumably furnished by plaintiff) of "solder saved" during the month or months covered, with total pounds saved (gross and net), its cost, amount of the two-thirds retained, followed by the words "check inclosed for one-third," and stating amount of check. None of the checks sent up here purport to have been delivered or accepted in full settlement of defendant's liability under the contract, for the stated period or otherwise; all are, on their face, in ordinary form. Six of them contain no indorsement by plaintiff, except his signature. Nine of them contain this indorsement (signed by plaintiff): "Indorsement on this check is a receipt in full for *following invoices*" (italics ours), followed (in the case of seven checks) by memorandum of amounts (covered by check) of "solder saved" (or "solder savings," or "solder savings adjustment") for the given month or months separately. In the case of the remaining two the descriptive words "solder," etc., are omitted; the indorsement reading (for example), "March account, amount 73.08, freight 14.28, check 58.80." Such receipt of monthly savings checks throughout a given year would not amount to a payment or waiver of payment of the annual minimum thereafter payable for that year; nor would such result follow from the fact that each of two of the checks covered payments for defendant's belated reports for a series of months both before and after the close of the calendar year. The checks would naturally have read the same, had the annual minimum provision been recognized as in force, and intended to be met.

[3] In determining whether the facts support the trial judge's conclusion of estoppel, we must start with the propositions that the contract clearly and unambiguously required defendant to pay after the end of each calendar year (and not until then) an amount which added to the monthly solder-savings payments, would aggregate $300 for each machine, and that the contract was not induced by fraud. Beyond this we must accept as final the facts found by the trial judge, so far as supported by testimony or reasonable inference therefrom. We must also accept such further facts as appear without dispute in the record.

The conclusions of fact made by the learned trial judge we accept with some modifications. In especial, we think the finding whose substance we have included in clause (c) above goes farther than warranted, in view of what we have said in discussing the question of fraud.

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We think the finding supported to this extent: Plaintiff always believed himself entitled to the minimum annual rental; the minimum provision, however, was not called to defendant's attention when the second contract (the one in suit) was signed, and the talk at that time regarding rentals related only to the percentage basis; defendant had overlooked or forgotten the minimum provision, if it had ever been impressed upon its mind, and made the monthly solder-savings payments under the supposition that its rental liability was thereby satisfied, and if it had had in mind that it was liable for an annual minimum it would either not have executed the contract in suit (as distinguished from its predecessor contract) or at least would have canceled it and returned the machines as soon as it appeared (as it later did) that the value of one-third of the solder saved was so greatly below the stipulated minimum; that at some time after plaintiff's failure to call for the minimum for 1906 he believed, without being so told, that defendant was making its monthly solder-savings payments and retaining the machines in the belief that its rental liability was being satisfied by such payments, and that plaintiff believing (certainly after the first three years' operation) that defendant would cancel the contract, at least long before it did, if the minimum provision were asserted, purposely refrained from such assertion, although probably intending to make such claim after the machines were all returned, especially if the aggregate monthly solder-savings payments for the entire period of years should be less than the aggregate annual minimum. Whether such cancellation would have been made in either of the first three years, which were perhaps more or less experimental, as depending upon the orders obtainable, and for the aggregate of which three years the total solder saved (not the one-third thereof) was $1,200 above the $300 minimum per machine, perhaps rests more or less on conjecture.

But giving defendant the benefit of the doubt respecting all conclusions of fact which we have treated as merely doubtful, and taking into account the acceptance of the monthly checks and the nonassertion of claim for annual minimum when due, the question is: Do these facts effect an estoppel against plaintiff? The question of waiver in this respect is so closely allied to estoppel as not to require separate treatment.

It may be conceded that, had the minimum provision been ambiguous, or had plaintiff known when the contract was made that defendant did not understand that the minimum provision existed, or had defendant offered to return the machines and been induced not to do so by distinct representation that defendant was liable only for one-third of the monthly savings, or had plaintiff, in connection with the payment of monthly savings, distinctly declared that defendant was liable to no further rental, thereby relieving defendant from attention on its part to the terms of its contract (Graham v. Thompson, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40; Westermann v. Corder, 86 Kan. 239, 119 Pac. 868, 39 L. R. A. [N. S.] 500, Ann. Cas. 1913C, 60), plaintiff's conduct in accepting the monthly payments would operate as

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an estoppel to claim the annual minimum. But no one of these conditions is present. If the acceptance of the monthly savings checks did not effect satisfaction and payment of the annual minimum, it is difficult to find in such acceptance any substantial effect by way of estoppel. The minimum liability was not merely contingent; it was fixed and inevitable. The form complete payment should take, whether through monthly payments alone, or following such payments through the addition thereto of a deficiency in such monthly payments, was the only contingent feature. What we have said respecting the relation of the letters of September, 1905, and July, 1906, to the subject of fraud in procuring the contract, applies also to the subject of estoppel.

Upon this record, the question comes down to this: Did plaintiff's receipt from month to month, over a series of years, of preliminary payments expressly provided for by his contract, without calling for the additional payments equally expressly, and clearly and unambiguously, called for by the same contract, which had been obtained in good faith and in the belief that defendant had read it and knew its conditions, estop him from claiming such annual payments before the statute of limitations has run against them, merely because he discovered that defendant (who retained one of the duplicate copies of the contract) supposed, through carelessness or forgetfulness, that it was paying all it was obligated to pay, and knew or believed that defendant would cancel the contract if demand for the annual minimum were made? Silence alone could not estop plaintiff, unless he was legally or in good conscience bound to speak.

[4] Granting that the Golden Rule would require that plaintiff save defendant from the consequences of its own carelessness or forgetfulness, by advising it of its liability under the contract (which defendant was legally bound to know), although such advice would have subjected plaintiff to a loss possibly as great as that from which defendant would thereby be saved, we are cited to no authority, nor have we found any, imposing a legal obligation to do so in a case such as here presented, especially when there is taken into account the possibility always existing from year to year that defendant might obtain orders enough to make its proportion of the savings equal or exceed the annual minimum. In our opinion plaintiff's mere silence, under the circumstances stated, did not create an estoppel. Slaughter's Adm'r v. Gerson, 13 Wall. 379, 20 L. Ed. 627; Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 337, 23 L. Ed. 927; Sheffield Car Co. v. Hydraulic Co., 171 Mich. 423, 137 N. W. 305, Ann. Cas. 1914B, 984; Bright v. Allan, 203 Pa. 386, 394, 53 Atl. 248; Ft. Scott v. Eads Brokerage Co. (C. C. A. 8) 117 Fed. 51, 54 C. C. A. 437.[1]

[1] In the Slaughter Case, 13 Wall. 385, 20 L. Ed. 627, Justice Field said: "The neglect of the purchaser to avail himself, in all such cases, of the means of information, whether attributable to his indolence or credulity, takes from him all just claim for relief."

In the Brant Case, 93 U. S. 337, 23 L. Ed. 927, the same Justice said: "Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

In Bright v. Allan, 203 Pa. 399, 53 Atl. 252, the court said, quoting from a

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[5] 5. As the case must be tried again, more must be said on the subject of limitation. The time when the balance required to make up the annual minimum is payable not being expressly stated in the contract, the law implies an obligation to pay within a reasonable time after it is earned (Palmer v. Palmer, 36 Mich. 487, 24 Am. Rep. 605), or, as applied to this specific case, within a reasonable time after defendant's monthly reports showed that the aggregate of solder-savings payments were less than the annual minimum. The question of reasonable time would be one of fact or of law, according as upon the record reasonable minds could or could not reach differing conclusions. International Co. v. Stadler (C. C. A. 6) 212 Fed. 378, 382, 129 C. C. A. 54; Marmet Co. v. Peoples Co. (C. C. A. 6) 226 Fed. 646, 141 C. C. A. 402. The limitation laws of Michigan control. Under the fourth subdivision of section 14135 of Howell's Mich. Statutes (2d Ed.), actions of assumpsit founded on contract, express or implied, must be commenced within six years after the cause of action accrues; and this without regard to the time when actual damage accrues. Aachen & Munich Fire Ins. Co. v. Morton (C. C. A. 6) 156 Fed. 654, 657, 84 C. C. A. 366, 15 L. R. A. (N. S.) 156, 13 Ann. Cas. 692. The case is not within section 14139 of the Michigan Statutes, which makes the balance due upon a mutual and open account current accrue at the time of the last item of the account. There was here no mutual and open account current. Kimball v. Kimball, 16 Mich. 211; White v. Campbell, 25 Mich. 463; Mandigo v. Mandigo, 26 Mich. 349. Defendant supposed the account closed monthly, plaintiff permitted it to be so treated. Payments were not made upon an open account as such, so as thereby to prevent the running of the statute. Each unpaid remnant of annual minimum was thus practically a separate installment under the contract, and could be sued for separately as soon as payable and without waiting for complete termination of the contract relations by the return of the last machine. From the time that each such remnant was subject to suit the statute began to run. Had the rental been for use of real estate, the action would

prior decision of the same court: "If, therefore, the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel." The preceding cases involved questions of title or boundary of real estate. The principle, however, seems equally applicable to the instant case.

In the Eads Case, 117 Fed. 56, 54 C. C. A. 442, Judge Sanborn said: "A misrepresentation by one party of a fact of which the other is actually and *permissively* ignorant is a sine qua non of an equitable estoppel." (Italics ours.) Petition for certiorari denied by Supreme Court, 187 U. S. 647, 23 Sup. Ct. 846, 47 L. Ed. 348.

In Sheffield Co. v. Hydraulic Co., 171 Mich. 450, 137 N. W. 315, Ann. Cas. 1914B, 984, the court quoted with approval the rule as stated in 11 Am. & Eng. Enc. of Law (2d Ed.) at page 434: "It may be stated as a general rule that it is essential to the application of the principle of equitable estoppel that the party claiming to have been influenced by the conduct or declarations of another, to his injury, was himself not only destitute of knowledge of the state of the facts, but was also destitute of any convenient and available means of acquiring such knowledge, and that, where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

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have been barred after six years under subdivision 3 of section 14135. Stewart v. Sprague, 71 Mich. 50, 60, 38 N. W. 673, 676. Whether or not that subdivision applies to rentals of the class here in suit (its language is "all actions for arrears of rent"), the principle of the decision is applicable, having in mind the language of subdivision 4 of the section "all actions of assumpsit * * * founded upon any contract * * * express or implied." If preliminary demand were necessary to the right to sue, the demand would be barred by the failure to make it within six years, and the right of action would be extinguished by the delay. Palmer v. Palmer, supra, 36 Mich. at pages 493, 494, 24 Am. Rep. 605; Sullivan v. Ellis (C. C. A. 8) 219 Fed. 694, 697, 135 C. C. A. 366. In this view, limitation could, at the most run only as against the years 1906, 1907, and 1908.

[6] 6. It is to be further noted that one machine was returned to plaintiff on June 30, 1909, another on August 17, 1909, and the last two January 28, 1913. As we construe the contract, taking all its provisions into account, the minimum royalty for each returned machine was not earned for the full year in which return was made (as demanded by plaintiff), but only for such portion of the year as it was kept by defendant.

The judgment of the District Court is reversed, with directions to award a new trial.

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(257 Fed. 980)

EDWARDS v. DAYTON MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1918.)

No. 3044.

1. PATENTS ⟸26(2)—INVENTION—COMBINATION—NEW RESULTS.
Invention may exist, even though every element is old, provided the combination either produces a new result or effects an old result in a new and materially better way.

2. PATENTS ⟸26(1)—LACK OF INVENTION—ELEMENTS OF PRIOR ART.
All elements of the prior art have a bearing on the question of invention, and it is unnecessary to a finding of lack of invention that every element be found in one embodiment.

3. PATENTS ⟸328—LACK OF INVENTION—COMBINATION OF ELEMENTS IN PRIOR ART.
The Edwards patent, No. 890,626, for an improvement in window holding and fastening devices, *held* void for lack of invention, consisting merely in a combination of the desirable elements of different devices in the same art.

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suit for infringement of patents by Oliver M. Edwards against the Dayton Manufacturing Company. From a decree for defendant, plaintiff appeals. Affirmed.

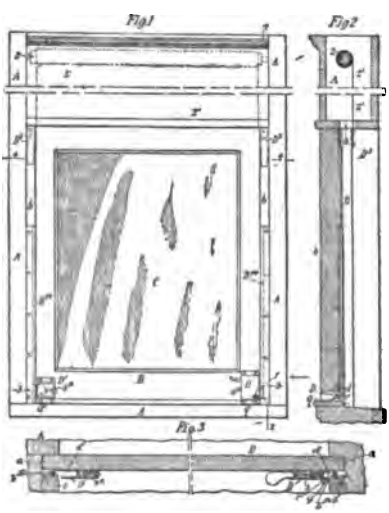
Arthur E. Parsons, of Syracuse, N. Y., for appellant.

H. A. Toulmin, of Dayton, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Suit for infringement of United States patent No. 890,626 to Edwards, June 16, 1908, for improvement in window holding and fastening devices. The District Court held the patent void for anticipation.

The device of the patent is sufficiently shown by Figs. 1, 2, and 3 of the patent drawings here reproduced, in which *A* is the window frame, *B* the sash adapted to move up and down in guides *a* in the frame, which is provided with stops *b*. The two lower fastening devices, *D* and *D'*, have each a wedge-headed bolt *d*, actuated by a spring *s*, which normally pushes the bolt outwardly into contact with a bevel-faced attachment to the frame stop *b*, whereby the sash is normally pressed toward the exterior of the window. The upper fastenings, *D2* and *D3*, consist each of a flat, bent spring, having one end fastened to the frame stop *b*, the free end bearing against the inside of the sash, and so tending to force the latter



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toward the exterior of the window. The exterior pressure of the four devices naturally tightens the window sash in its frame, so tending to prevent rattling and to exclude dust and cold.

The lower fastenings, *D* and *D'*, are provided each with a finger-actuated lever, by which the wedge-headed bolt *d* may be withdrawn from contact with the bevel-faced stop attachment *b*; the window thus being readily raised by lifting through the finger pieces alone or by the contributing action of the counterbalance *Z* and its belt *Z'*, which, however, are no necessary part of the invention. The beveled attachment to the frame stop is itself provided with a plurality of stops, enabling the holding of the window at different heights. The release of the bolts *d* through the use of the finger levers enables the lowering of the sash by gravity, except as limited by the frictional action of the leaf springs, *D2* and *D3*. The specification shows various modifications of the devices represented by the figures we have reproduced, but they involve nothing calling for special mention.

The claims in suit are Nos. 1, 15, 21, 22, 23, 24 and 26. We copy in the margin the twenty-sixth claim, which is the broadest and the fifteenth claim which is the most specific.[1]

The claimed invention, to say the least, rests upon a very narrow foundation. There was nothing novel in either the upper or lower fastening devices themselves, nor in their mere adoption for the purposes to which the patent applied them, viz. to support the sash at any desired elevation so tightly as to prevent rattling and to exclude dust and drafts of air, and at the same time permit the ready release of the holding attachment sufficiently for the opening and closing movement. Indeed, plaintiff's counsel frankly concedes that there would be no invention in adopting either the two lower holding devices alone or the two upper holding devices by themselves.

It is contended, however, that there is invention in the use of the four holding devices shown, whereby the four points of pressure contribute together to force the sash outwardly, thus preventing rattling and the entrance of dust and air—in connection with the means for raising the window.

Counsel more explicitly limits the claim of invention (by adoption of the description of plaintiff's expert) to—

[1] "26. In a window the combination, substantially as set forth, of a guideway, a sash adapted to move therein, and a series of spring actuated individual holding devices, a portion of which series is provided with means to partially release the sash and another portion of such series is unprovided with such means and is adapted to bear against the sash in its movement to open and close the window and partially hold it in its guideway."

"15. In a window the combination, substantially as set forth, of a guideway, a sash adapted to move in the guideway, individual holding devices adapted to bear against the sash at different points, a portion of which bear with substantially equal force in either direction of movement of the sash, one point of bearing for each device, a plurality of which devices are provided with movable parts yieldingly bearing against the sash, each of which is actuable, actuating means for such parts, and coacting portions for the holding devices, a portion being arranged substantially in the direction the sash moves with which the bearing surfaces of the holding devices may frictionally bear and hold the sash in the guideway."

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"a plurality of sash-holding devices independent of each other, and each pressing the sash outwardly against a given point of the outer stop of the guideway, a portion of these devices—those at the lower left-hand and right-hand sides of the sash—being releasable and having means whereby they are released in the movement for raising the sash to open the windows, and whereby movement is given to the sash. The remainder of these devices, those at the upper corners of the cash, being non-releasable, whereby the sash is more or less supported and controlled in its opening and closing movements."

This is apparently intended to include a combination of the two non-releasable devices above, and at least one below.

Reference to the prior art shows that each element of the device of the patent was old in the window sash holding art, long before the Edwards patent was applied for. In 1880 (antedating Edwards by 23 years), Brittain, by British patent No. 3531, disclosed a car or door window, opened by lowering and vertically shiftable by means of a strap attached to a lever on the lower edge of the window, whose sash, for the purpose of preventing rattling of the window, carried at each of its two upper corners wedge-headed bolts, actuated by coil springs, normally pushing the bolt heads against a bevel-faced stile in the door frame. The sash also carries near each of its two lower corners non-releasable, rearwardly pressing leaf springs. The patent also describes a construction of the wedge-headed bolts whereby, through the use of sufficiently strong coil springs, the sash can be held in any position to which it may be brought, and the bolts released through handles on the inner ends of their stems. It is clear that the engagement of the bolt-heads of the upper fastenings with the bevel-faced stiles causes a wedging action, and thereby a tendency to force the bolt heads themselves and thus indirectly the window, rearwardly and at right angles to its plane. The specification does not in terms state, and the drawings (which are not shown to be made to scale) do not all show, the window sash when closed as actually overlapping the rectangular frame stiles, and unless that were so, the device would not appreciably exclude dust and air, and the leaf springs would not exert pressure when the window is closed, or nearly so.

One of the drawings, however, indicates an actual overlapping of the sash, and the natural inference would be, from the specification and drawings taken together, that such overlapping was intended, and that the leaf springs were intended to be operative when the window is entirely closed as well as when open or partly open. But, were the Brittain patent to be rejected as an anticipation, for lack of clearness in the respects mentioned, it is still an important reference, as disclosing, in the same art, a structure evidently designed by the inventor for four point corner pressure, to be accomplished by devices of the same type as those of the patent in suit; and no one would claim that it would be invention merely to reverse Brittain's arrangement of holding devices by putting his releasable wedge-shaped bolts below and his nonreleasable leaf springs above, to meet the problem of a window opened by raising instead of by lowering. The existence of a four point rearward pressure when the window is partly open has at least an important bearing on the question of invention in employing such pressure at all times.

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Kane, however, in 1892, by United States patent No. 473,757, had disclosed an invention for keeping the window tight (when either closed or open) and preventing it from rattling, and at the same time permitting ready release of the sash, when desirable to raise or lower it, by the use of attachments, one on the inner face of each of the four corners of the sash, whereby a beveled bar is pressed against a beveled guideway in the frame, thereby through a wedging action forcing the sash against the outer stops. The release of the two lower fastenings automatically released the upper fastenings also. Here we have the direct exterior pressure of the sash itself against its outer stops, with the natural effect of excluding dust and drafts of air, as well as preventing rattling.

Again, Waddington, in 1893, by British patent No. 15,003, showed a device for the stated purpose of holding either sash of a window (including railway carriage windows) in desired position (partly raised or partly lowered), consisting of leaf springs, one at each corner of the sash; one end of the spring being attached to the sash-face, the free end (with or without antifriction roller thereon) bearing against the window frame and pressing the sash, in a direction at right angles with the face of the window, into close engagement with the frame. While the specification does not expressly state against which stop the sash is pressed, the drawings seem to indicate pressure against the outer stop. The natural and direct effect of the Waddington device was to prevent rattling and to exclude dust and air.

Still further, Howe, in 1891 (United States patent No. 448,882), showed a device for supporting a sash (including that of a car window) at any desired elevation, and so tightening it in the frame as to make it "firm and to exclude dust," and at the same time permit its ready release, by the use of a single finger-operated bevel-headed plunger, forced by coil springs against the beveled face of a vertical rack bar with stops thereon, so as, by a wedging action, "to force the sash outwardly against the rabbet of the window frame and thereby render the sash tight against such rabbet." If it excluded dust, it would, of course, exclude drafts of air.

[1, 2] Other more or less pertinent references to the prior art might be made; but those cited, even disregarding Brittain (who, plaintiff's expert says, discloses "the closest approach to the structure and organization found in the patent in suit"), are sufficient to show that, while no one reference contains all elements of the claims in suit, yet every element, according to plaintiff's counsel's interpretation of them already given, is specifically disclosed in substantially the same relation and for substantially the same purpose for which they are employed in the patent before us. While invention may exist, even though every element is old, provided the combination either produces a new result or effects an old result in a new and materially better way (Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Ferro Concrete Constr. Co. v. Concrete Steel Co. [C. C. A. 6] 206 Fed. 666, 669, 124 C. C. A. 466), yet all elements of the prior art have a bearing upon the question of invention, and it is unnecessary to a finding of lack of invention that

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every element be found in one embodiment (Keene v. New Idea Spreader Co. [C. C. A. 6] 231 Fed. 701, 708, 145 C. C. A. 507).

[3] Upon careful consideration of the prior art, and giving due weight to the well-established utility of plaintiff's device and its highly favorable commercial reception, we are unable to find in it room for invention. The most which, to our minds, can be said is that the inventor has, in the exercise of a high degree of mechanical skill, selected and put together the most desirable parts of different devices in the same art, making a new structure, doubtless better than any which preceded it, but in which each part operates in substantially the same way as it did in the old and effects substantially the same result. This is not invention. Overweight Counter-Balance Co. v. Vogt Mach. Co. (C. C. A. 6) 102 Fed. 957, 43 C. C. A. 80; Railroad Supply Co. v. Elyria Iron Co., 244 U. S 285, 37 Sup. Ct. 502, 61 L. Ed. 1136; Huebner-Toledo Breweries Co. v. Matthews Gravity Carrier Co., 253 Fed. 435, 165 C. C. A. 177 (decided by this court October 8, 1918).

The decree of the District Court is accordingly affirmed.

(258 Fed. 990)

PATAPSCO SHIP CEILING & STEVEDORE CO. v. SIEBERT.

(Circuit Court of Appeals, Fourth Circuit. April 24, 1919.)

No. 1690.

1. MASTER AND SERVANT ⟸358—ELECTION OF REMEDY—WORKMEN'S COMPENSATION ACT.

A stevedore, injured while loading a vessel, who was entitled under Judicial Code, § 24, par. 3, as amended by Act Oct. 6, 1917, to the remedy afforded by the state Workmen's Compensation Act, *held* not to have elected that remedy by signing at the request of an attorney the notice to his employer contemplated by the Compensation Act, and to be entitled to sue in admiralty, etc.

2. SHIPPING ⟸84(3)—INJURIES TO STEVEDORE—SAFE PLACE TO WORK—ORDERS.

A stevedore company, though it ordered its foreman to remove all hatch beams, etc., *held* charged with knowledge of noncompliance with order, so that it could not escape liability to a stevedore, injured by the falling of a beam on the ground the company had discharged its duty as to furnishing safe place, etc.

3. SHIPPING ⟸84(4)—INJURIES TO STEVEDORE—VICE PRINCIPAL.

The foreman of a stevedore company *held* a vice principal as to a stevedore, so the company could not escape liability for the foreman's negligence on the ground he was a fellow servant of the injured stevedore.

4. DAMAGES ⟸132(9)—PERSONAL INJURIES—MEASURE.

Held, that $3,791 should be allowed a stevedore for injuries which necessitated the amputation of his leg below the knee, and caused a loss of wages and expenditure for medical attention amounting to $791.

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Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Libel in admiralty by John Siebert against the Patapsco Ship Ceiling & Stevedore Company, the Prince Line, Limited, and Furness Withy & Co., Limited. Decree for libelant against the first-named respondent. Affirmed.

The opinion filed below, and here reprinted from 253 Fed. 685, was in full as follows:

ROSE, District Judge. On January 5th last the respondent, the Patapsco Ship Ceiling & Stevedore Company, hereinafter called the "employer," was engaged through its employés, of whom the libelant was one, in loading the Chinese Prince, hereinafter referred to as the "ship." The respondents the Prince Line, Limited, and Furness Withy & Co., Limited, were respectively owner and agent of the ship.

The libelant was working in the ship's hold. By the fall of one of the strong backs intended to support the hatch covers, one of his legs was so badly crushed as to necessitate amputation below the knee. He suffered other serious and painful injuries, but these, fortunately, proved to be temporary.

[1] One week after the accident libelant signed the notice to the employer, contemplated by the Workmen's Compensation Act of Maryland, that he had been hurt, and requesting that it should, in accordance with law, supply him with medical attendance. This notice was countersigned by a well-known member of the Baltimore bar, and by or through the latter was promptly served upon the employer. Thereafter the same attorney filed a claim with the state Industrial Accident Commission. Because libelant was long in the hospital, the hearing was put off, and before it was actually held he asked permission of the commission to withdraw his claim. After inquiry, the commission permitted him to do so, on the ground that in the condition he was at the time he signed the notice he did not so appreciate its nature as to make it fair to hold that he had irrevocably committed himself by it. The employer in this court insists that, in spite of the findings and action of the commission, the delivery of the notice was a final election to waive libelant's right to proceed in the admiralty.

The libelant here testified that he signed such notice because it was brought to him by a young man who told him he should sign it. It was then only a week after the accident, and he was in such a state of pain from some of his injuries that he could not, and did not, give the matter any consideration, but appended his signature, as he had been bidden to do. He said he thought the young man referred to was an assistant to the member of the bar who had countersigned the paper, but how either of them had learned of the accident, or who, if any one, had asked either of them to interest himself in the mat-

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ter, he did not know. I sent at once for the attorney in question, and he testified that he had never seen the libelant until the latter was out of the hospital, and had come to tell him that he wanted to put his case in other hands. He further stated that the matter had originally been brought to him by a young lawyer, whose name he gave, and for whom he had occasionally tried cases; but the gentleman had at least temporarily quit practice to accept employment in a munition plant. There the evidence on this branch of the case stopped, except that it appeared that the employer, in consequence of the notice referred to, but without the knowledge of the libelant, had shortly after the accident paid $29 of the latter's hospital expenses. Before he was discharged from the hospital, his total bill had run up to $266.

The evidence shows, as the commission held, that the libelant did not appreciate, and was not in a condition to appreciate, the significance of the paper he had signed, nor did he know that the person who procured his signature was claiming to act as his representative. Every rational system of jurisprudence strives to insure, as far as may be, that a man shall not lose important rights merely because he has done some formal thing in excusable ignorance of its nature and significance.

When it came out for the first time at the hearing in this court that the $29 had been paid, I required the libelant to reimburse the employer as a condition to going on with his case. This was done at once. I did not intend to rule that such a requirement should always be made, as sometimes it might work hardship and injustice; but it is obviously fair wherever the libelant is in a condition to comply with it, as in this case he was. In this state of the record, it is unnecessary to decide anything, except that this libelant was free to prosecute his libel. Whether he could have done so, had he understandingly invoked the jurisdiction of the commission, need not be passed upon.

The act of Congress approved October 6, 1917 (40 Stat. 395, c. 97) gave an employé, injured on water, the right to avail himself of the Workmen's Compensation Law of the state. This result was accomplished by amending paragraph 3 of section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. 1916, § 991]). The relevant portions of that paragraph were a part of the original Judiciary Act of 1789, and gave the District Courts of the United States cognizance of "all civil cases of admiralty and maritime jurisdiction, saving to all suitors the right of a common-law remedy, where the common law is competent to give it." The amending statute added the words, "and to claimants the rights and remedies of the Workmen's Compensation Law of any state." So far as I know, it has never been held that the mere institution of a common-law suit to recover for a maritime tort precluded the plaintiff from subsequently seeking relief in admiralty.

[2, 3] It remains to pass upon the merits. The accident happened because the libelant was working under a hatch beam or strong back, which had not been removed, and which was not bolted in place. The hook or the chain, used to raise and lower the load, caught under the beam and pulled it out of its support. There is no question that the

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place in which the plaintiff was working was, under such circumstances, unsafe.

It is in evidence that the employer had given general instructions to its foremen always to remove all the hatch beams, or, if any were left in place, to see that they were firmly secured by bolts or pins. It is argued that the foreman was a fellow servant of the libelant, and that the latter assumed the risk of his negligence. It is true that the instruction was given, and that the chief executive of the employer appreciated its importance, and was sincerely anxious that it should be obeyed. It is equally clear, however, that his subordinates habitually disregarded it, in that they never made any real attempt to see that it was enforced.

To remove the hatch beam took from 5 to 15 minutes. The bolts for it were not always right at hand. The foreman and the gang leaders were anxious to maintain their tonnage record. Familiarity with danger made them careless of the safety of the men under them. So generally was the instruction ignored, and so easy would it have been for the employer to have discovered that fact, that it cannot now successfully claim that by merely issuing the order it had done all that was incumbent on it to make sure that the men were given a safe place in which to work. That obligation it could not delegate. Moreover, the foreman or "chargeman," who should have seen that the beam was removed or bolted in, was, upon the evidence, a vice principal, rather than a fellow servant, of the libelant. He had full charge of the loading of the ship and of all the men employed in doing it. Subject to his orders were the gang leaders, who had the right to employ and discharge the workmen—in the modern vernacular, the power of "hiring and firing." The men who did the actual work were bound to obey the orders of the foreman. I am satisfied, although he denies it, that he gave the order not to remove some of the beams, including the one which fell on the libelant, and that the libelant and his fellow workmen, if they were to maintain their places, had no choice other than to do what he told them to do. The employer must be held liable.

There is nothing shown to charge either of the other respondents, and as to them the libel must be dismissed.

[4] The costs of medical attendance, of the artificial limb, and the loss of wages of libelant while in the hospital, total $791. I will allow $3,000 more as compensation for his suffering and permanent injuries, or an aggregate of $3,791.

A decree against the employer for that amount will be signed.

Whitelock, Deming & Kemp, of Baltimore, Md., for appellant.

George T. Mister and Harry B. Wolf, both of Baltimore, Md., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PER CURIAM. We are satisfied with the disposition of this case by the court below, and deem it unnecessary to add anything to what is said in the opinion of the learned District Judge. Affirmed.

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(258 Fed. 143)

VANDENBURGH v. CONCRETE STEEL CO.*

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 172.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CONCRETE REINFORCING BAR.

The Vandenburgh reissue patent, No. 14,182, for a concrete reinforcing bar, claims 1 and 2, are void, as too broad. Claims 3 and 5 disclose invention and are valid; also *held* infringed.

2. PATENTS ⟸147—REISSUE—PARTIAL INVALIDITY.

The fact that some of the claims of a reissued patent are invalid, as too broad, does not invalidate other claims.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by George E. Vandenburgh against the Concrete Steel Company. Decree for defendant, and complainant appeals. Reversed.

Carlos P. Griffin, of San Francisco, Cal. (James H. Griffin, of New York City, of counsel), for appellant.

Lucius E. Varney, of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. [1] United States reissued patent 14,182, to George E. Vandenburgh, for a concrete reinforcing bar, was held void for want of invention by the District Court for the Western District of Pennsylvania in the suit of Vandenburgh v. Electric Welding Co., 259 Fed. 579, while the court below dismissed the bill in this case against the Concrete Steel Company for noninfringement. Both courts held that the original patent did not contemplate collapsibility of the structure, because the spiral coil was described as rigidly fixed by kerfs and spurs on the reinforcing bar. For this reason it was held that claims 1 and 2 of the reissue, which were intended to cover collapsibility of the structure, were invalid, as too broad. We agree in this conclusion.

But claim 3 of the reissue is literally the same as claim 3 of the original patent, and claim 5 of the reissue is literally the same as claim 4 of the original patent. These claims should be construed consistently with the specifications, which are also literally the same in each patent, as meaning that the spiral coil is rigidly connected with the longitudinal bar at each point of contact. So construed, the claim describes a continuous spiral rigidly and integrally connected with kerfs and spurs in the bar, constituting a trusslike structure within the body of the concrete, resisting lateral and longitudinal strains, and which can be more cheaply manufactured than if the spiral were riveted or welded to the bar at each point of contact.

[2] The defendant's witness Cummings frankly admits that this form of reinforcing structure was new in cement work and has come into general use. The fact that claims 1 and 2 of the reissue are invalid, as too broad, does not invalidate claims 3 and 5. Gage v. Her-

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*Certiorari denied 250 U. S. 664, 40 Sup. Ct. 11, 64 L. Ed. —.

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ring, 107 U. S. 640, 646, 2 Sup. Ct. 819, 27 L. Ed. 601. The defendant's structure when set up to receive the concrete is exactly the same as plaintiff's, except that the spiral coil is not rigidly fixed by kerfs and spurs on the bar. This enables the structure to be collapsed when not in use, a commercial improvement for purposes of shipment, but which does not justify the defendant's appropriation of the plaintiff's structure.

The decree is reversed, with half costs to the plaintiff.

(258 Fed. 1)

O. C. BARBER MINING & FERTILIZING CO. v. BROWN HOISTING MACHINERY CO.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1919.)

No. 3148.

1. SALES ⟸439—DEFECTS—BURDEN OF PROOF.
Where a buyer's retention and use of a locomotive crane prior to suit for the purchase price were sufficient to reveal the claimed defects, the buyer, who defended on the ground of such defects, has the burden of proving them.

2. APPEAL AND ERROR ⟸995—REVIEW—EVIDENCE.
On writ of error, the Circuit Court of Appeals will not weigh the evidence.

3. SALES ⟸445(1)—ACTIONS—WARRANTY—JURY QUESTION.
Though Gen. Code Ohio, § 8395, specifies when implied warranties will or will not arise, yet where the facts on which such implied warranties might or might not arise are in conflict, the questions are for the jury.

4. SALES ⟸445(1)—IMPLIED WARRANTIES—JURY QUESTION.
In an action for the purchase price of a locomotive crane, where the buyer defended on the ground that the crane did not comply with the implied warranty arising under Gen. Code Ohio, § 8395, because the seller was advised of the buyer's needs, etc., *held*, where there was testimony that the crane was sold under its patent or trade-name, and that the buyer's agents inspected the same, the question whether any implied warranty arose was for the jury.

5. SALES ⟸425—BREACH OF WARRANTY—RIGHTS.
Under Gen. Code Ohio, § 8449, relating to breach of warranty, a buyer, on discovery of the breach, is at liberty either to return or offer to return the article and recover any part of the price paid, or to accept and keep the article and set up breach of warranty by way of recoupment, in diminution or extinction of the purchase price.

6. SALES ⟸287(3)—BREACH OF WARRANTY—ACCEPTANCE.
Where a buyer of a locomotive crane retained the same and used it for a long time, there was an acceptance, even though the buyer asserted in correspondence that it had not accepted the crane, because it did not comply with an asserted warranty.

7. SALES ⟸442(14)—BREACH OF WARRANTY—DAMAGES.
Where a buyer of a locomotive crane, notwithstanding discovery of alleged defects, retained and used the crane, and as a result of asserted de-

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fects it dropped stones on a building when being used, *held* that, under Gen. Code Ohio, § 8449, relating to breach of warranty, damages arising out of such use of the crane cannot be recovered, where the buyer made no attempt to have the defects remedied.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by the Brown Hoisting Machinery Company against the O. C. Barber Mining & Fertilizing Company, which counterclaimed. There was a judgment for plaintiff, and defendant brings error. Affirmed.

F. R. Marvin, of Cleveland, Ohio, for plaintiff in error.

Clinton M. Horn, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Action to recover purchase price, $6,400, and interest, for sale of a 10-ton type "H" 4-wheel Brownhoist locomotive crane. The Brown Company, plaintiff below and herein called the seller, recovered judgment, and the Barber Company, defendant below and herein called the buyer prosecutes error.

The terms of sale were defined by written contract. The crane was to be delivered and completely erected by the seller at the plant of the buyer in Howenstine, near the city of Canton, Ohio.[1] The buyer was then engaged in the manufacture of fertilizing lime from limestone and coal, though not by a method involving the use of a crane. The limestone and coal had been brought to the site of the plant in cars, and removed thence into the kilns in different ways; some in course of removal being dumped in piles, called stock piles, adjacent to the kilns. At the time the contract was entered into certain new kilns were in course of erection near the site of the old kilns and stock piles, and the crane in question was to be used in removing the materials from stock piles to the new kilns. The contract provides:

"The seller guarantees said crane to be capable of handling at the buyer's plant No. 1, Howenstine, Ohio, 300 tons of limestone and mine-run coal from stock pile to cupola in 10 hours, the relative proportions of stone and coal to be three of stone to one of coal."

The petition alleges that the seller delivered and erected the crane and equipment at the buyer's plant in January, 1915, and in all respects complied with the terms of the contract; that the buyer had been in the continuous possession and use of the crane and equipment from that time to the commencement of the suit, October 8, 1915; and that, although the price was payable February 1, 1915, the buyer refused to pay any part of it. The answer admits these allegations, except the one as to compliance with the contract, avers that the crane was

[1] The crane and its equipment were described in the contract thus: "One 10-ton type 'H' 4-wheel Brownhoist steam locomotive crane, with 55-ft. boom, 8-ft. 0 in. gauge, ¾ cab double drum equipment, 16000# counterweight in truck frame and Brownhoist patent 54 cu. ft. grab bucket."

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defective in several particulars, and seeks damages in diminution—indeed, in extinction—of the purchase price. The verdict, as well as the judgment, is upwards of $900 less than the amount of the purchase price and accrued interest, though how this happened does not distinctly appear; but, as will be pointed out when considering the measure of damages applied, it is reasonably clear that the sum mentioned was fixed and allowed as the buyer's damages.

[1] 1. *Guaranteed Capacity of the Crane.* It is said that the crane is not capable of removing 300 tons of material in accordance with the terms of the guaranty. The testimony is in conflict upon this subject. This is particularly true of certain tests that were made. Upon this issue it is objected that the court placed the burden of proof upon the buyer. The buyer's retention and use of the crane prior to commencement of the suit were concededly sufficient to reveal the claimed defects; and certainly it could not assert the right to recover damages on account of defects without showing what they were. This was an affirmative defense; and the rule is to place the burden of proving such a defense upon the defendant, the buyer here. Crescent Milling Co. v. H. N. Strait Mfg. Co., 227 Fed. 804, 809, 142 C. C. A. 328 (C. C. A. 8); Dodsworth v. Hercules Iron Works, 66 Fed. 483, 488, 13 C. C. A. 552 (C. C. A. 6).

[2] It is settled that an appellate court of the United States does not weigh the evidence. Besides, although the use of the guaranteed capacity does not seem in practice to have been needed, it is clear enough that the crane easily met the daily requirements of the buyer in the removal of stone and coal from the stock piles to the kilns. The verdict, apart from the allowance of damages as stated, would naturally imply that the guaranty respecting the capacity of the crane was substantially complied with; the effect of the verdict, however, must be considered later.

[3, 4] 2. *Implied Warranty Claimed.* It is urged that conditions existed here which, under the Ohio Uniform Sales Act (Gen. Code, § 8395), charged the seller with an implied warranty that the crane was reasonably fit for the purposes for which the buyer purchased it. Assuming that there is no inconsistency between the admitted express guaranty and the claimed implied warranty (G. C. O. § 8395, par. 6), several considerations arise. It is said that the trial judge erred in refusing to instruct the jury that the implied warranty claimed was, as matter of law, included in the seller's obligation. Against this it is contended, and several witnesses testify without contradiction, that the name under which the crane was sold was its trade-name, and that the grab bucket was patented; and the jury was permitted to consider whether, in the light of all the evidence, including the descriptive matter in the contract, the crane was sold under its patent or trade-name, and was told that if the sale was so made there could not be an implied warranty. This was in accord with paragraph 4 (section 8395):

"In the case of a contract to sell or a sale of a specified article under its patent or other trade-name, there is no implied warranty as to its fitness for any particular purpose."

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The buyer claims in avoidance of this provision that the undisputed testimony shows that the seller was fully advised of the purposes for which the crane was desired, and that the buyer relied on the seller's skill and judgment as to the fitness of the crane for such purposes. This is to insist that the claim of implied warranty is controlled exclusively by paragraph 1 (section 8395):

"When the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, * * * there is an implied warranty that the goods shall be reasonably fit for such purpose."

Here again the case presents difficulty touching the state of the evidence. True, before the contract was entered into the seller was advised of the place at which the crane was to be erected and of the purpose to use it in transferring the materials from the stock piles to the kilns; but the testimony is in conflict as to the seller's previous knowledge of certain matters of which the buyer subsequently complained. It is important to note that the matters of subsequent complaint for the most part concern the grab bucket; one complaint is that frequently one or more large pieces of limestone are caught between the teeth or jaws of the bucket, which so far prevent the bucket from closing as to permit smaller pieces to fall upon and injure the roof of a building and endanger employés of the buyer during the movement of the bucket from the stock piles to the kilns; and the other is that the bucket is not adapted to the proper distribution of the materials when discharging them into the kilns.

It is perhaps enough to say of the first of these complaints (1) that the testimony is in conflict upon a question whether the buyer attempts to carry larger stones than those previously disclosed in the stock piles or represented as intended to be conveyed; and (2) that the evident liability and tendency of large pieces of stone or coal so to be caught and of the stone, rather than the coal, to hold the jaws of the bucket apart and permit the escape of smaller pieces in any attempt to load and carry such material, ought to have been revealed by examinations which admittedly the buyer through its general manager and expert engineer made of this type of buckets before the contract was entered into (paragraph 3, § 8395); this is strengthened by the fact that no complaint is made touching the handling of coal, the other material.

As to the second complaint, there is testimony from which it might fairly be inferred that the distribution would not be open to criticism if the bucket were properly placed and operated when discharging the materials into the kilns. These complaints would seem on their face to affect the method of using rather than the inherent qualities of the bucket. It is to be observed, moreover, that the testimony offered to support the complaints was not received for the purpose of showing an implied warranty that the crane would handle stone without dropping any of the smaller parts, or would distribute the materials in any particular way in the kilns; it was received for the purpose of determining whether the buyer made known to the seller the pur-

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pose for which it needed the crane, and relied on the skill and judgment of the seller in that behalf.

If, then, it be borne in mind that the solution of the issues of implied warranty depended on the one hand upon whether the crane was sold under its trade-name, and on the other whether the buyer made known to the seller the purposes of purchasing the crane and also relied on the seller's skill and judgment as to the fitness of the crane, and, further, that testimony was received on both of these subjects independently of the testimony relating to the method pursued in loading and operating the bucket, it becomes plain that the trial judge believed that the testimony was in such conflict as to require its submission to the jury. And the questions were submitted under instructions as to what facts either express or implied would justify a finding that an implied warranty of fitness existed, and with a further instruction that such a finding was permissible notwithstanding the express guaranty as to the capacity of the crane. The court was thus dealing with distinct and in some respects opposed issues, and also with conflicting testimony touching the problem of implied warranty; in these circumstances the applicable provision of the Sales Act was to be ascertained according to the preponderating testimony under the several issues—as, for instance, was the crane sold simply under its trade-name, or did the buyer make known to the seller the purpose for which the crane was required, and particularly did the buyer rely on the seller's or on its own skill and judgment?

Manifestly these questions, like any ordinary disputed questions of fact, were determinable by the jury. Mr. Williston says, in his work on Sales (section 214, at p. 284):

"If the seller's liability is based on representations and affirmations, because of which the law imposes upon him the obligations of a warrantor, disputed questions of fact as to the nature of the assertions and the reliance of the buyer will generally give rise to disputed questions of fact, which will require submission to the jury of the whole question of warranty."

In Kansas City Bolt & Nut Co. v. Rodd, 220 Fed. 750, at page 755, 136 C. C. A. 356, at page 361, our own court held it to be error to instruct "the jury not to consider evidence of plaintiff's reliance upon the alleged warranty." Again, we may by way of analogy call attention to the ruling of this court in D. H. Watjen & Co. v. Louisville Tobacco Warehouse Co., 240 Fed. 919, 923, 153 C. C. A. 605, that issues of fact whether a sale had been conducted under rules of an association or wholly through private negotiation, and whether a warranty had been given concerning the subject of the sale, were to be determined by the jury, and that it was error to refuse so to submit the issues. In Dushane v. Benedict, 120 U. S. 630, 646, 648, 7 Sup. Ct. 696, 30 L. Ed. 810, where the plaintiff sought to recover the purchase price of rags and the defense was breach of warranty regarding the quality of the rags, it was held erroneous to direct a verdict for the plaintiff; the court saying that under the evidence the question whether an express or implied warranty existed should have been submitted to the jury. And submissions to the jury of similar questions under appropriate instructions were approved in Noble v. Fagnant, 162

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Mass. 275, 285, 286, 38 N. E. 507; Rodgers & Co. v. Niles & Co., 11 Ohio St. 48, 49, 57, 78 Am. Dec. 290; Henry & Co. v. Talcott, 175 N. Y. 385, 393, 67 N. E. 617; Horse Importing Co. v. Novak et al., 105 Iowa, 157, 159, 160, 74 N. W. 759; Englehardt v. Clanton, 83 Ala. 336, 341, 342, 3 South. 680; Foster v. Smith, 184 Ill. App. 255, 257; Woods v. Thompson, 14 Mo. App. 38, 45, 46, 88 S. W. 1126. Aside from the allowance of damages of upwards of $900, the effect of which we shall presently determine, the logic of the verdict is that under the evidence either an implied warranty did not arise or, if one did arise, it was substantially fulfilled.

[5-7] 3. *Measure of Damages, and Effect of Verdict.* The instruction on the subject of measure of damages in substance was that if the jury should find that the express guaranty had been broken, or that the implied warranty claimed had been proved, and also broken, the loss would be the difference between the value of the crane in its actual condition at the time of delivery and the value it would have possessed if all the seller's obligations had been met; that in estimating this difference the latter value should be treated as $6,400, the contract price, and the former the market value, or, in the absence of a definite market value, the actual value of a crane of this kind, though not meeting the requirements of the sale; and that the evidence did not tend to show any proximate damages other than such reduction in value of the crane. Counsel's objection to this portion of the charge is that it was not comprehensive of the buyer's entire loss, since it prevented the jury from considering claimed proximate damages occasioned by breach of warranty; reliance being placed on paragraphs 6 and 7 (G. C. O. § 8449, Sales Act):

"(6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events from the breach of warranty.

"(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

The insistence is that the injury to the roof on which pieces of stone dropped fom the bucket, cost of employing a man to distribute the materials in the kilns, and waste of material falling from the bucket constitute "loss directly and naturally resulting, in the ordinary course of events from the breach of warranty" (paragraph 6), and also that such loss was due to "special circumstances showing proximate damage of a greater amount" than the difference between the value of the crane at the time of delivery and the value it would have had if it had "answered to the warranty" (paragraph 7).

We cannot accept these views. It will be observed that the contention of counsel is not aimed against the court's allowance of recovery for the difference between the values of the crane as before pointed out; it is against the refusal of the court to recognize the items of damage claimed as a loss additional to the difference in values allowed. The learned trial judge excluded these items for the reasons, in substance, that the buyer had accepted and continued

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to use the crane with knowledge that such use would result in the very damages complained of, and that damages so inflicted are not recoverable. It is not pretended that the claimed defects were of a nature to escape discovery when the crane was first put into operation and tested. Assuming that a breach of the express guaranty or of an implied warranty occurred, the buyer, it is true, was at liberty either to return or offer to return the crane and to recover any part of the purchase price it might have paid (section 8449, par. 1, d), or to accept or keep the crane and set up breach of warranty by way of recoupment in diminution or extinction of the purchase price (Id. par. 1, a). It scarcely need be said that the buyer elected to rely upon this latter provision. We agree with the District Judge that the buyer accepted the crane, for, although it asserted in correspondence that it had not accepted, its conduct through retention and long use of the crane was a contradiction of the assertion. Dodsworth v. Hercules Iron Works, 66 Fed. 483, 487, 13 C. C. A. 552 (C. C. A. 6).

In this situation, the right to recover damages resulting through the continued use of the crane must be considered in connection, not alone with the buyer's claim of a breach of warranty, but also and particularly with its claim that it was necessary to remedy the defects complained of. It ought to be sufficient to say of the special damages now under consideration that they cannot be, as counsel insist, the direct and natural result of a breach of warranty or due to special circumstances showing proximate injury within the meaning of the Sales Act, and for the obvious reason that the buyer's own conduct was an intervening and the immediate and operating cause. Indeed, the general rule is that a buyer cannot, after discovery of defects in a warranted article, accept and continue to use it in an unchanged condition, and so inflict injuries upon himself and his property at the expense of the seller. Uhlig v. Burnum, 43 Neb. 584, 595, 61 N. W. 749; Swift & Co. v. Redhead, 147 Iowa, 94, 105, 122 N. W. 140; American Glue Co. v. Rayburn, 150 Mich. 616, 620, 114 N. W. 395; Isbell-Porter Co. v. Heineman, 113 App. Div. 79, 83, 98 N. Y. Supp. 1018, and citations; Ducas Co. v. American Silk Dyeing Co., 48 Misc. Rep. 411, 415, 95 N. Y. Supp. 590; Frick Co. v. Falk, 50 Kan. 644, 647, 32 Pac. 360; Cooper v. National Fertilizer Co., 132 Ga. 529, 532, 533, 64 S. E. 650; Hitchcock v. Hunt, 28 Conn. 343, 348, 349; 1 Sutherland on Damages (4th Ed.) § 89, p. 317 top. We do not find any decision, and none is cited, which is opposed to the rule stated or to the decisions set out in its support. This is not to overlook the cases of National Refrigerator Co. v. Parmalee, 9 Ga. App. 725, 72 S. E. 191, and Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 26 C. C. A. 389 (C. C. A. 8). We think that in each of those cases the conduct of the seller operated to charge it with affirmatively consenting to the buyer's use of the article as a fair method of ascertaining the damages suffered while efforts were being made to remedy admitted defects; if this is not rightly to interpret the ultimate facts disclosed in those cases, we cannot follow the decisions.

It results that the court properly excluded the evidence offered to show the items and amounts of damage claimed in addition to such as may have been embraced in the difference allowed between the

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values respectively of the crane as contracted for and as delivered. The difficulty with the instant case in this regard is that, aside from the loss covered by this difference in values, the buyer made no showing of any loss incurred within any recognized scope of the seller's liability; it is hence vain to urge, as counsel do, that the matter of special damages was a question for the jury. The parties were throughout more or less at odds upon one feature or another of the crane. Yet the buyer does not appear to have made any effort through outside manufacturers to remedy the claimed defects; it does not show, for instance, whether the grab bucket was susceptible of alteration and remedy nor the expense that any available change would have involved; it simply shows, apart from contentions with the seller, a persistent use of the crane in the regular course of its business, notwithstanding the injurious effects which such use would obviously inflict upon it and its property. The buyer's course was opposed even to the familiar rule that a person injured through wrongful act of another must so far as reasonably practicable mitigate the damage. What in the judgment of ordinarily careful and experienced men would have been a reasonably prudent course to adopt and pursue in similar circumstances, and (apart from the difference in values allowed) what, if any, damage would have directly and proximately ensued, are left to conjecture, although, as to the existence and breach of the implied warranty claimed, the burden of proof was upon the buyer. Noble v. Fagnant, supra, 162 Mass. 286, 38 N. E. 507; Sayles v. Quinn, 196 Mass. 492, 495, 82 N. E. 713; Johnson v. Bowman, 26 Neb. 745, 750, 42 N. W. 754; Crescent Milling Co. v. H. N. Strait Mfg. Co., supra; Dodsworth v. Hercules Iron Works, supra.

It is to be presumed that this feature of the case was lacking in facts, except as to the use already considered; and it need not be added that such lack of proofs could not be supplied through guesswork. An appellate court certainly cannot help out a situation like this.

The effect of the verdict, then, is plainly to show that the crane was worth about $900 less by reason of its condition at the time of delivery than it would have been if it had answered to the express guaranty and to the implied warranty, assuming that such a warranty existed. But it cannot be important whether the reduction was due to one or the other, or to both, of these causes, since the result would be the same, if it were assumed that the jury found under the court's instruction that the crane was sold under its patent or trade-name and consequently that no implied warranty could have arisen as to fitness.[2]

[2] In view of the fact that the question of implied warranty was submitted to the jury, it has, of course, been unnecessary here to consider how far, if at all, that question might as matter of law have been governed by the express terms of the contract itself as respects the contention that the crane was sold under its patent or trade name. See, for example, majority and minority opinions, with citations, in Davis Calyx Drill Co. v. Mallory, 137 Fed. 332, 334, 338, 69 C. C. A. 662, 69 L. R. A. 973 (C. C. A. 8); also Savery Hotel Co. v. Under-Feed Stoker Co., 178 Fed. 806, 808, 102 C. C. A. 254 (C. C. A. 8); Baer Grocery Co. v. Barber Milling Co., 223 Fed. 969, 972, 139 C. C. A. 449 (C. C. A. 4).

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It is not necessary further to pursue the subject; we have considered the other assignments, and have found no prejudicial error; accordingly the judgment will be affirmed.

(258 Fed. 9)

ZAJKOWSKI v. AMERICAN STEEL & WIRE CO.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1918.)

No. 3195.

1. MASTER AND SERVANT ⟸256(2)—INJURIES TO SERVANT—OCCUPATIONAL DISEASE—CAUSE OF ACTION.

Petition of servant, employed in operation of finishing rolls for pressing sheets of steel, rendered blind and invalided in his employment, *held* to state facts constituting a cause of action for damages due to an occupational disease incident to work plaintiff was performing.

2. MASTER AND SERVANT ⟸150(2)—INJURIES TO SERVANT—OCCUPATIONAL DISEASES—WARNINGS.

Where an employer continues an employé for a substantial time in work under conditions which, in the absence of precautions, are calculated to engender disease, it is the employer's duty to warn and instruct the employé, and to furnish him with effective means to avoid the danger.

3. MASTER AND SERVANT ⟸94—INJURIES TO SERVANT—OCCUPATIONAL DISEASE—VIOLATION OF STATUTE.

Under Page & A. Gen. Code Supp. Ohio, § 6330—1, the employer of an operator of finishing rolls for sheet steel was liable for destruction of the health and sight of the operator, caused by the constant glare of strong light on the rolls he was required to inspect; the legal consequences of violating the statute not being limited to the penalty prescribed in section 6330—9.

4. NEGLIGENCE ⟸6—VIOLATION OF PENAL STATUTE.

Where a statute, though penal in character, plainly imposes a duty for the benefit of a class of individuals, a right of action accrues to a person of such class, injured through breach of the duty.

5. MASTER AND SERVANT ⟸376(2)—WORKMEN'S COMPENSATION ACT—OCCUPATIONAL DISEASE.

In view of Const. Ohio, art. 2, as amended September 3, 1912, and in view of Page & A. Gen. Code Supp. Ohio, § 6330—1, the Workmen's Compensation Act of the state (103 Ohio Laws, p. 72, approved March 14, 1913) has no application to the case of an operator of sheet steel finishing rolls, blinded and invalided by the strong glare of powerful lights from the glittering surfaces he had to inspect, an occupational disease.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by Mike Zajkowski against the American Steel & Wire Company. To review a judgment for defendant, plaintiff brings error. Judgment reversed, and case remanded for further proceedings not inconsistent with the opinion.

We understand the theory of this action to be that it is one to recover damages arising under conditions calculated to cause and causing an occupational disease. The case was disposed of below upon the pleadings and the opening statements of counsel. The petition, a very long one, in substance states: The plaintiff, as an employé of defendant, was for two years occupied in the operation of certain power-driven finishing rolls which with certain dies were used for pressing sheets of steel and forming them into

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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desired sizes, and in seeing that the sheets of steel as they came from the rolls were of perfect texture and precise dimensions, and, at the same time, measuring the steel in a minute and particular way through the use of delicate measuring instruments. This was done under electric lights of high power and in substantial part maintained about 18 inches above the plane of the steel sheets. The surfaces of the sheets were "almost as bright as a mirror," and the surfaces of the rolls were bright; the sheets were long and as they came from the rolls they were continuously "waiving, shaking, and wobbling," so that there was at all times an intense glare of light, and at times flashes of light cast into plaintiff's eyes. Plaintiff was obliged to strain his eyes to the utmost in order to discover the condition of the sheets with respect to texture and dimensions, irregularities, and scratches. Defendant's foreman found it necessary to use a magnifying glass to inspect plaintiff's work. To produce steel sheets of the quality indicated, they were put through various processes, such as dipping into chemicals and applying oils, grease, and water, before reaching the rolls, and thus plaintiff's eyes, hands, and system became saturated with these substances, so that his health and the sight of both eyes were ultimately destroyed. Meanwhile he notified defendant that his eyesight was becoming "blurred and foggy," and that he could not read the gauging instrument as freely as before. This brought about an examination on the part of defendant's physician; but plaintiff was sent back to his work, and he remained until March, 1916, when he notified defendant that he could not see to do the work; he was thereupon led by defendant's foreman from the premises and "told to go home." In the course of his work he was not provided with goggles or other devices to prevent the splashing of liquids into his eyes or to diminish the strain upon them. Defendant gave him no notice or warning of the dangers of injury to his eyesight or health, nor instructions in that behalf, and he was ignorant of these dangers. He had been in defendant's employ some four years when he was ordered to enter upon the work above described; at the time of entering upon the new work he was possessed of perfect eyesight and health. The disease so contracted was aggravated through the overheated condition of the place in which plaintiff was required to work, and also through extra exertions caused by defects in the machinery and lack of necessary assistance; and plaintiff frequently complained to defendant concerning the defective condition of the machinery, and repeated promises were made to remedy the defects, though these promises were not kept. Damages are claimed in the sum of $50,000.

The answer admits defendant's operation of the plant for the alleged purpose of manufacturing wire and other products, that plaintiff was in its employ as a laborer, denies the other allegations of the petition, and as a further defense avers that it had complied with the Workmen's Compensation Act of Ohio, and that by reason thereof plaintiff is not entitled to maintain the action. It was in effect admitted in the statements of opposing counsel that defendant had complied with the requirements of the Compensation Act.

At the close of the opening statements of counsel and on motion of defendant a verdict was directed in its favor, and judgment entered accordingly, upon which plaintiff below founds the writ of error.

Louis H. Winch, of Cleveland, Ohio, for plaintiff in error.
Wm. L. Day, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and McCALL, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). [1] In the view of the learned trial judge, the Workmen's Compensation Act (102 Ohio Laws, p. 524) gave to defendant immunity from any right of action that might otherwise have accrued to plaintiff under the facts alleged in his petition. Laying that act to one side for the

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present, we think the petition states facts constituting a cause of action for damages due to an occupational disease which was incident to the work plaintiff was performing. Diseases of occupation have been the subjects of much concern and investigation both abroad and in our own country. Such diseases, of course, signify causes and conditions, whether natural or artificial, which attend the performance of work and injuriously affect the persons exposed. They have been variously defined, such as, for instance, "the poor health which results from working under improper conditions"; again, "disease due to the employment"; and Dr. Thompson, in his recent work on Occupational Diseases, says that such diseases—

"may be defined as maladies due to specific poisons, mechanical irritants, physical and mental strain, or faulty environment, resulting from specific conditions of labor. * * * They arise from a great variety of poisons, irritating substances, and exposure to unusual physical conditions."

The occupation described in the petition extended over a period of more than two years, and the disease complained of developed and progressed by gradual process until it culminated at last in the loss of plaintiff's eyesight and health alike. Plaintiff's trouble was not due to causes outside of the environment of his work, nor was it one of accident or of traumatism in the sense of violence; it was due to causes incident to his service whose effects upon his eyesight and health are alleged to have been unknown to him though within knowledge reasonably imputable to defendant. The instant case is broadly distinguishable from that of Industrial Commission v. Roth, 120 N. E. 172, 16 Ohio Law Rep. 251, 252, 254, to be reported in 98 Ohio St. 34, where Roth, though not a painter, was directed temporarily to do some painting, and died from inhaling poisonous fumes and vapors arising from a bucket of hot paint; and his death was held to be the result of an "accidental and unforeseen inhaling" of a "specific, volatile poison or gas," and not the result of an "occupational disease"; indeed it was said by Judge Donohue in the course of the opinion:

"In this case it is admitted that the deceased was a common laborer, and that the disease of lead poisoning is not incident to his regular occupation, but, on the contrary, is incident to the work in which he was employed for the two days preceding his illness."

[2] The case set out in the petition falls well within principles of the common law. The general rule is that where an employer places and continues an employé for a substantial length of time in the regular performance of work and under conditions which, in the absence of preventive means and precautions, are calculated to engender in the employé a disorder of serious and injurious character, regardless of the name by which the disease is known, it is the duty of the employer to warn and instruct the employé as to the dangers and to furnish him with reasonably effective means to avoid them, and where as the direct result of failure to perform this duty an employé in the exercise of reasonable care suffers injury through a disorder so contracted, he is entitled to recover. Wiseman v. Carter White Lead Co., 100 Neb. 584, 587, 589, 160 N. W. 985; Thompson v. United Laboratories Co., 221 Mass. 276, 280, 108 N. E. 1042; Fox v. Peninsular,

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etc., Works, 84 Mich. 676, 682, 48 N. W. 203; Wagner v. Jayne Chemical Co., 147 Pa. 475, 479, 23 Atl. 772, 30 Am. St. Rep. 745; Meany v. Standard Oil Co. (N. J. Sup.) 55 Atl. 653; Pigeon v. Fuller, 156 Cal. 691, 698, 701, 105 Pac. 976.

[3, 4] Furthermore, recognition of the right of recovery upon facts such as are stated in the instant case is found in both constitutional and statutory provisions of Ohio. By amendment of September 3, 1912, to article 2 of the Ohio Constitution (Page's Annotated Constitution [Ed. 1913] pp. 171 to 217, § 35), provision was made looking to the compensation of "workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment," through laws to be passed by the General Assembly; section 35 providing however that—

"No right of action shall be taken away from any employé when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employés."

On May 6, 1913, the General Assembly of Ohio passed a statute entitled "An act for the prevention of occupational diseases with special reference to lead poisoning." 103 Ohio Laws, 819 to 824. Section 1 of the act (section 6330—1, Page & A. Gen. Code Supp. Ohio) provides:

"Every employer shall, without cost to the employés, provide reasonably effective devices, means and methods to prevent the contraction by his employés of illness or disease incident to the work or process in which such employés are engaged."

In distinct sections of the same act the manufacture of certain named products of lead is declared to be "especially dangerous," and employers engaged in the manufacture of these products are required to furnish devices and means of specific kinds to avoid the dangers of lead poisoning. Section 9 imposes penalties upon employers for violation of certain sections of the act, including section 1, which are applicable to the particular business in which the offending employer is engaged. Argument is not necessary to show that the purpose of this legislation was to impose upon employers duties designed for the protection of their employés. The effect of the first section, 6330—1, is to charge the employer with the duty to protect employés from the contraction of disease which is incident to the work they are required to perform. The intent plainly is to require the employer, where necessary, to ascertain what "devices, means and methods" are "reasonably effective" to prevent contraction of an occupational disease; and certainly in most instances the employer rather than the lawmaker is qualified rightly to understand what measures are necessary. The class of business occupations thus dealt with manifestly differs from the class of manufactures contemplated by the sections relating to lead products; since the first class would seem to concern work and processes involving dangers not so well known as those attending the manufacture of lead products.

The purpose to impose duties upon employers embraced in the first class as well as the second is accentuated by the imposition of

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penalties upon both classes alike; and while there might be greater difficulty in proving an offense under the first class than under the second, the duty is none the less positive in character in the one than in the other. These features derive emphasis in the instant case from the allegations that defendant provided no measures whatever for the protection of plaintiff's eyesight and health. It hardly is necessary to add that the legal consequence of violating section 6330—1 is not limited to the penalty prescribed in section 9 of the act; for the rule is that where a statute, although penal in character, plainly imposes a duty for the benefit of a class of individuals a right of action accrues to a person of that class who is injured through breach of the duty. Variety Iron Co. v. Poak, 89 Ohio St. 297, 303, 307, 106 N. E. 24; N. Y., C. & St. L. R. R. Co. v. Lambright, 5 Ohio Cir. Ct. R. 433, 434; Narramore v. Cleveland, C., C. & St. L. Ry. Co., 96 Fed. 298, 300, 37 C. C. A. 499, 48 L. R. A. 68 (C. C. A. 6); 2 Cooley on Torts (3d Ed.) pp. 1400, 1408, and citations.

[5] We thus come to the ruling below. In considering the petition the District Judge said:

"If it does not state a cause of action under the Workmen's Compensation Law and within the exception of the Workmen's Compensation Law, it does not seem to me that the petition states any kind of cause of action."

We are, however, convinced that this act has no bearing upon the instant case. The act, as the name usually given to it indicates, provides for the collection of a state insurance fund and its disbursement among employés. According to the title of the act, the fund is designed "for the benefit of injured, and the dependents of killed employés" (103 Ohio Laws, 72, approved March 14, 1913). Section 13 defines employers to whom the act is applicable. Section 22 provides for employers' payments of premiums. Section 23 is in part as follows:

"Employers who comply with the provisions of the last preceding section shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of any employé, wherever occurring, during the period covered by such premium so paid into the state insurance fund. * * *"

The saving clause so referred to is found in section 29, which in substance provides that "where a personal injury is suffered by any employé or where death results to an employé from personal injury * * * while in the course of employment," an employer who has paid his premiums shall not be liable unless such injury or death shall have arisen from the "willful act" of the employer or from the employer's failure to comply with any "lawful requirement for the protection of the lives and safety of employés," but in either of the latter events "nothing in this act contained shall affect the civil liability of such employer."

It is to be observed that the act is limited to compensation for "injury" or "death" of employés; it makes no provision in that behalf for disease. We have seen that the Constitution permits the passage of laws providing compensation for employés or their dependents in cases of "death, injuries or occupational disease." Industrial Commission v. Brown, 92 Ohio St. 309, 110 N. E. 744, presented the ques-

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tion whether Brown, an employé who had contracted lead poisoning in the course of his employment, was entitled to participate in the fund designed for the compensation of employés under the original Workmen's Compensation Act of May 31, 1911 (102 Ohio Laws, 524), which, of course, was before adoption of the constitutional amendment. Brown applied to the proper official board for compensation and his claim was disallowed; he appealed to the Hamilton common pleas, where he recovered judgment, which necessarily entitled him to be paid out of the insurance fund (section 36, Id. p. 531), and this action was affirmed by the Court of Appeals of the same county, though reversed by the Ohio Supreme Court. The Compensation Act then under consideration, like the present one, provided only for "injuries or death." Section 20—1, 21—2, Id. 528, 529. In the course of the opinion Chief Justice Nichols said (92 Ohio St. 314, 110 N. E. 746):

"It is to be observed that the constitutional amendment differentiates between injuries and occupational disease. It clearly recognizes three distinct classes for which provision may be made: (1) Injuries resulting in death; (2) nonfatal injuries; and (3) occupational diseases—and all are to be limited to such as might be occasioned in due course of employment. The present law specifically provides for compensation for two of these classes only and significantly omits any provision for compensation for the third class. Were this claim one that had accrued under the new law, the court could only construe the passage in dispute, in the light of the Constitution, as wholly excluding any compensation for injury by disease, whether occupational or otherwise. The Legislature would have been within its constitutional rights had it included the third class, and its failure to do so, under the circumstances, makes of it a case of designed omission."

This ruling was approved in Industrial Commission v. Roth, supra, 16 Ohio Law Rep. 253. The case of Roth, like that of Brown, grew out of an application to the proper board for compensation to be paid out of the insurance fund. The claim was disallowed by the board on the theory that Roth had died of an occupational disease, and this denial was in effect affirmed on appeal to the Jefferson common pleas, but was reversed in the court of appeals of that county, and the reversal was affirmed in the Supreme Court on the ground, as we have already pointed out, that Roth had met his death through an "accidental and unforeseen inhaling" of a "specific volatile poison or gas" and not from an "occupational disease"; but the implication is clear that if the death had resulted from that disease the right to participate in the insurance fund would have been denied; indeed it is declared both in the first paragraph of the syllabus and in the opinion (16 Ohio Law Rep. 251, 254) that an occupational disease is "not within the contemplation of the Workmen's Compensation Law." The impelling feature of these decisions, when considered together, is that Brown's claim failed because he was affected by an occupational disease, while Roth's succeeded because his death was not the result of occupational disease, but of an accident.

It results, in view of the controlling authority of these decisions, that the Compensation Act is inapplicable, and, it need not be said, that the exemption from liability given by section 23 of the Compensation Act to employers who comply with the provisions of section 22,

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and the exceptions contained in section 29 in relation to employers who are open to the charge of willful acts or failure to perform any lawful requirement within the meaning of that section, are not of present importance. It cannot be that the Compensation Act was designed to take away any right of action as respects a claim, like the one here involved, which the act does not purport to include or to allow to be paid out of the insurance fund. Any view to the contrary must ascribe to the General Assembly at once a purpose to frustrate the power vested by the Constitution in respect of occupational disease and a lack of purpose through section 6330—1 to grant relief of any character to employés contracting such disease. That statute was passed after the Compensation Act, and, as already shown, was intended to create and preserve rights of action where the duty it imposes is violated. For similar reasons the case of Woodenware Co. v. Schorling, 96 Ohio St. 305, 117 N. E. 366, Ann. Cas. 1918D, 318, relied on by the company, is not on its facts relevant. Schorling sustained injuries through the fall of lumber from a car, which clearly brought his case within the Compensation Act; and although his employer had complied with the act Schorling sought recovery by an ordinary action at law. Among the grounds urged was that under section 35, art. 2, of the Constitution, and section 29 of the Compensation Act, sections 15 and 16 of the Industrial Commission Act constitute "lawful requirements" for the violation of which the action could be maintained; but it was in effect held that those sections are not self-executing and must be supplemented by special orders of the Industrial Board. Id. 96 Ohio St. 320, 321, 117 N. E. 366, Ann. Cas. 1918D, 318. Thus the decision in that case, like the scope of the statutes it construed, does not reach the question involved in the instant case. In fact, Judge Johnson said (at page 317 of 96 Ohio St., at page 370 of 117 N. E. [Ann. Cas. 1918D, 318]):

"There is nothing in the Industrial Commission Act which indicates an intention of the Legislature to enlarge or diminish the rights of employés and employers under the Compensation Act, which had then recently been passed."

The Industrial Commission Act was approved March 18, 1913 (103 Ohio Laws, 95, 110), while, as we have said before, section 6330—1 was approved the following May 6th (Id. 819, 824), and no reference was made in the last statute either to the Compensation Act or the Industrial Commission Act. Section 6330—1 stands alone as the latest expression of the legislative will; it is in terms both complete and imperative; it should be given effect.

When it is remembered that plaintiff's action is based upon alleged negligence of defendant and freedom from fault of his own, the conclusion must follow that it was error to deny a right of recovery both under the common law and section 6330—1.

Accordingly the judgment is reversed, with costs, and the case is remanded for further proceedings not inconsistent with this opinion.

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(258 Fed. 16)

YOUTSEY v. NISWONGER.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1918.)

No. 3202.

1. APPEAL AND ERROR ⟸792—DISMISSAL—NECESSITY FOR MOTION.
The Circuit Court of Appeals will, on its own motion, dismiss an appeal, where it appears that it was not taken in time.

2. BANKRUPTCY ⟸461—APPEAL—TIME FOR TAKING.
While an appeal, under Bankruptcy Act, § 25a (Comp. St. § 9609), providing for appeals in bankruptcy proceedings, must be taken within the 10 days permitted, an appeal under section 24a (section 9608) relating to appeals in controversies arising in bankruptcy, may be taken at any time within 6 months.

3. BANKRUPTCY ⟸440—CONTROVERSY IN BANKRUPTCY—WHAT IS.
Proceedings on motion by bankrupt after discharge to reopen estate on the theory that his interest in land had improperly been scheduled as life estate, instead of fee-simple estate, etc., *held* not to present a controversy arising in bankruptcy, appealable under Bankruptcy Act, § 24a (Comp. St. § 9608), but to be reviewable by petition to revise, under section 24b; it appearing that proceeding was of the most summary character.

4. WILLS ⟸442—CONSTRUCTION—INTENTION OF TESTATOR.
The clearly expressed intention on the part of testator as to interest devised should govern, unless forbidden by law.

5. WILLS ⟸607(1)—CONSTRUCTION—INTEREST DEVISED—ESTATES TAIL.
Where an Ohio testator devised lands to his children for their natural life, directing that on their death the property should go to the heirs of their body, but if any should die without leaving heirs of their body the lands, subject to the rights of curtesy or dower of the spouses of such children, should revert back and be divided equally between those living or their heirs per stirpes, *held*, under Gen. Code Ohio, §§ 8622, 10578, that a son of testator did not take an estate in fee, but his estate ended with his life and his issue took in fee simple.

6. WILLS ⟸629—CONSTRUCTION IN FAVOR OF VESTING OF ESTATES.
The laws favor the vesting of estates, and they will be regarded as so vesting at the death of the testator, unless a contrary intention appears.

Appeal from the District Court of the United States, for the Southern District of Ohio; Howard C. Hollister, Judge.

Petition by William H. Youtsey to reopen bankruptcy proceedings after his discharge and settlement of the estate, against George Niswonger, trustee in bankruptcy. From an order denying the petition, petitioner appeals. Affirmed.

Alexander R. Hawthorne, of Troy, Ohio, for appellant.

F. C. Goodrich and Wm. H. Gilbert, both of Troy, Ohio, for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

KNAPPEN, Circuit Judge. Petitioner was in the year 1913 adjudged bankrupt on his voluntary petition. He scheduled in connection therewith his real estate as a "fee-tail estate" in a quarter section of land in Miami county, Ohio, "for life only," and "subject to an in-

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choate right of dower" in his wife; also subject to a lease, not here important.

Bankrupt's interest in the land was derived under the will of his father, who died in 1882. By that will the testator in terms gave a farm to each of his five children; each of four of them, including the bankrupt, being required to pay to the testator's widow a certain sum yearly during her life, in lieu of her dower rights in the several tracts of land. Then followed the express provision that the "devises to the several devisees as named are to be to them for their natural lives. And on their decease to go to the heirs of their bodies, and if any die leaving no heirs of their bodies, then their devise to revert back (subject to right of curtesy or dower as the case may be) and as hereafter provided, and be divided equally between those living or their heirs per stirpes." The foregoing provision was immediately explained by the testator as meaning "although the fee to the several tracts of land by me devised to my several children does not vest in them, but in the heirs of their bodies, that the wives and the husbands of said children herein named, now married or that may hereafter marry, shall have the same interest of dower or curtesy, as though the fee had vested in my said sons and daughters. Except if any die without heirs of their bodies, then to revert as above provided by me in this my will." Testator's wife died in the year 1907; bankrupt having meanwhile made to her the annual money payments required by the will. When bankruptcy occurred, bankrupt had a wife and two living adult children, each of whom was the parent of living children.

The bankrupt's estate, so scheduled, was sold in the course of bankruptcy administration to one of the bankrupt's sons, and the sale duly confirmed. The son thereupon conveyed to his mother an estate in the land for her life; she also claiming an inchoate dower interest under the will, as the bankrupt's wife.

The bankrupt was discharged in the year 1914. In the year 1917, and after the estate had been distributed and closed, the bankrupt petitioned the District Court to open up the case, on the ground that his interest in the land had by mistake been scheduled as a life estate instead of a fee-simple estate, whereby his unsecured creditors received nothing, whereas the fee-simple estate was worth more than enough to pay creditors in full. He asked that his "trustee carry out his trust as provided by act of Congress," etc. Notice of the motion was given by the bankrupt to the son named, as well as to the bankrupt's wife, and the two were heard in opposition to the motion, although they otherwise made no appearance or intervention. Judge Hollister, who presided below, held that the bankrupt had but a life estate, and that he properly so scheduled his interest. The motion to reopen the case, which was also recited in the court's opinion as one to set aside the discharge in bankruptcy, was denied. This appeal is from that denial.

The bankrupt's son and wife were not made parties to the appeal by service of citation or otherwise, and have not been heard in this court, except as they presented their view of the merits in connection with their motion to dismiss the appeal, on the grounds, first, that it came too late, and, second, that the order was not appealable.

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[1-3] Whether or not they are entitled to make this motion is unimportant, for it would be our duty to dismiss the appeal on our own motion in case it did not lie or was not taken in time. If the appeal is to be regarded as the motion treats it, as taken under section 25a (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. § 9609]), it would have to be dismissed for the reason that it was not taken within 10 days, even if it could be thought to fall within that section. The appeal was, however, in time if it comes under section 24a, relating to "controversies arising in bankruptcy"—such appeals being permitted within six months. In re Gold (C. C. A. 7) 210 Fed. 410, 414, 127 C. C. A. 142. An ultimate controversy as to the title of the land, duly instituted as between the bankrupt estate and adverse claimants, would doubtless be a "controversy" within section 24a. But such controversy was not ultimately submitted. While the denial of the motion was based upon an adverse construction of the bankrupt's claimed title, such decision was incidental to the denial of the motion to reopen. Had administration been reopened upon the court's conception that the bankrupt owned an estate in fee simple, the reopening of administration would not have been an adjudication in the trustee's favor or against adverse claimants. It would still have been necessary to an adjudication that further proceedings be instituted to test the title, with opportunity to all adversely interested to be heard, including, at least, the other son of the bankrupt and perhaps other contingent heirs. Indeed, the bankrupt's son and wife, who were heard in opposition to the motion to reopen, were evidently notified of the hearing, not as claimants of the fee, but only as purchasers of the life estate; and, as already said, even the purchasers were not made parties to this appeal. The motion to reopen was a proceeding of the most summary character, not even accompanied by possession on the part of the estate of the property in question. It would seem a strained construction to hold this proceeding, so far as it had gone, as of a plenary character, or more than merely a step in the course of administration. If of the latter character, it was reviewable by petition to revise, under section 24b (Comp. St. § 9608). In re Jacobs (C. C. A. 6) 241 Fed. 620, 154 C. C. A. 378; Barnes v. Pampel (C. C. A. 6) 192 Fed. 525, 113 C. C. A. 81—remedies under sections 24a and 24b being mutually exclusive. Barnes v. Pampel, supra. We prefer, however, not to base our disposition of the case upon the nonappealability of the order below, for we think the bankrupt's claim of title on which the motion below was based is without merit.

[4-6] An intention on the part of the testator that the bankrupt should take only an estate which should end with his life, and that thereupon it should pass to the bankrupt's heirs, is expressed as plainly as language can well state it; and it is a commonplace that the testator's intent, when clearly shown, must govern, unless the result is forbidden by law. It is not so forbidden.

In the matter of Andrew S. Youtsey, Bankrupt (D. C.) 260 Fed. 423, 15 Ohio Law Rep. 125, Judge Sater considered the title to a farm derived by Andrew, a brother of the present bankrupt, likewise under the father's will in question, and held that the testator did not create

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a fee tail, but a life estate in Andrew, with vested remainder in his children. Judge Hollister applied this view to the present bankrupt's title. In the Andrew Youtsey Case it was necessary to define the actual estate held by Andrew on account of certain conveyances and transactions by parties interested in the estate remaining after the termination of the bankrupt's estate. Such considerations do not exist here. For the purposes of the case before us it is immaterial whether the devise was, in legal definition, to the bankrupt for life and after his death to his heirs in fee (subject only to the provision for dower by the bankrupt's wife), or whether of a fee tail, passing after the bankrupt's death to the heirs of his body instead of to his heirs generally; for, as applied to the first contingency, the Ohio statute (G. C. § 10578) provides that "the conveyance shall vest an estate for life only in such first taker, and a remainder in fee simple in his heirs"; and as to the other contingency, it is declared with equal plainness (G. C. § 8622) that "all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." Thus, in either contingency, the bankrupt's estate ended with his life. This result is not affected by the construction placed by the Ohio courts upon section 8622, by which the children of the bankrupt (if he is a donee in tail) took no estate in the land which they could alienate during their father's lifetime. Dungan v. Kline, 81 Ohio St. 371, 90 N. E. 938. Nor, treating the estate in question as one in fee tail, is it important whether the bankrupt's interest as first donee was technically a mere life estate or a tenancy for life of an entailed fee. See Harkness v. Corning, 24 Ohio St. 416, 426, and following; Dungan v. Kline, supra, 81 Ohio St. 371, 382, 90 N. E. 938 and following. Regardless of legal terminology, his estate ends with his life, he is without power to convey an interest which will continue thereafter, and his issue take in fee simple. Pollock v. Speidel, 17 Ohio St. 439; Harkness v. Corning, supra; Dungan v. Kline, supra. The dower right given to the bankrupt's wife seems, under the Ohio statutes to be consistent with an estate in fee tail. Harkness v. Corning, supra, 24 Ohio St. 416, 429.

The argument in support of the bankrupt's contention that under his father's will he took a fee-simple estate seems to be that the testator intended to pass the entire title to some one, that the will speaks from the testator's death, that at that time neither of the bankrupt's sons were living and there were thus no heirs of the bankrupt's body, and that therefore the entire estate vested in him as the first donee.

This contention seems to us completely answered, first, by the fact that the language of the will plainly excludes the notion that the "heirs" of the bankrupt's body who were in the testator's mind were merely those who might be in existence at the latter's death; and, second, by section 8622 of the General Code, which, after declaring that "no estate in fee simple, fee tail or any lesser estate in lands or tenements, lying within this state, shall be given or granted, by deed or will, to any person or persons but such as are in being," adds, "or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." We

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are not cited to, nor have we found, any decisions of the courts of Ohio or elsewhere tending to sustain appellant's contention, in the face of the statute just cited. The authorities are otherwise.

The rule that the law favors the vesting of estates, and that they will be regarded as so vesting at the death of the testator unless a contrary intent appears, has upon this record little, if any, application. There is no point in the argument that the testamentary provision in question violates the rule against perpetuities. Gen. Code Ohio, § 8622; Turley v. Turley, 11 Ohio St. 173; Dungan v. Kline, supra; In re Andrew S. Youtsey, Bankrupt, supra, 14 Ohio Law Rep. at page 129.

In view of what we have said, it is not very material whether the appeal is dismissed or the order below affirmed. Our disposition will take the latter form.

(258 Fed. 20)

CITY OF PADUCAH v. PADUCAH WATER CO.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1919.)

No. 3158.

APPEAL AND ERROR ⟸781(2)—DETERMINATION OF MOOT QUESTION—SUIT BY WATER COMPANY AGAINST CITY—REPEAL OF ORDINANCE.

Where a water company sued the city to restrain enforcement of an ordinance and resolution, as impairing the obligation of the water supply contract between the company and the city and as depriving the company of its property without due process of law, and the city repealed its ordinance, the question involved became moot, and decree for the company will be reversed and the suit dismissed, despite the fact that the resolution of the city, involving a question of remote rather than present concern, was adopted after the beginning of suit and the repeal of the ordinance.

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Suit in equity by the Paducah Water Company against the City of Paducah. From decree for plaintiff, defendant appeals. Reversed, and cause remanded, with direction to dismiss the suit.

This suit grew out of a question arising in the city of Paducah, whether as respects streets about to be permanently paved the cost of renewing or replacing therein service pipes connecting the water mains with the property lines of consumers should be borne by the water company or by the abutting owners.

The city of Paducah, under an ordinance as amended in October, 1884, granted to J. A. Jones and his assigns the privilege of constructing and operating waterworks, and of laying mains, conduits, and pipes, with fire hydrants, in and along the streets, alleys, avenues, and public grounds of the city, to supply water for both public and private purposes during a term of 40 years, unless the works should be purchased by the city. The Paducah Water Company, a Kentucky corporation, appears to have succeeded to this grant as early as 1887 and to have operated the plant ever since. The ordinance prescribed annual rentals which the city itself undertook to pay during a term of 20 years for the supply of water through certain fire hydrants to be placed on the water mains at points it should select; also general water rates "equal to, but not exceeding, the average rates charged" in five named cities; but the grantee was distinctly required to "furnish water free of

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charge to all city buildings, public schools, and churches, also one public drinking fountain for man and beast in each ward of the city, at such places as the council may designate, also, one fountain in each and every public park the city may hereafter establish and one in the courthouse square."

While the ordinance forbids under penalty any person or corporation to take or use water from the works "for domestic or other purposes without contracting for same," it makes no specific provision for service pipes, and so does not expressly impose any obligation upon the company nor upon the consumer to pay the cost of installing, connecting, or renewing such pipes. No showing or question is made concerning payment for service pipes used in furnishing water free of charge. It is, however, in substance shown that, from the installation of the water works until the present controversy arose; the service connections and pipes used in supplying water to private consumers were furnished by the abutting property owners and at their expense through plumbers employed by them and licensed by the city; that the water company has uniformly repaired "such pipes between the mains and the property lines when necessary," though where streets were permanently improved under direction of the city the abutting owners have made renewals of service connections and pipes.

On May 30, 1917, the city adopted an ordinance which in effect required the water company upon 10 days' notice to "renew or replace, at its own expense, any service pipes extending from the water mains * * * to the property lines of the water consumers," denounced failure so to do as a misdemeanor and, upon conviction, imposed a fine of $5 for each day the company should fail or refuse to comply with the notice, providing, however, that such notice should not be given "except in the case of service pipes in and under streets to be paved with permanent * * * pavement," and that such renewals or replacements should not be required except where the commissioner of public works should find them to be necessary. On the 1st of June following, notice was given to the company to comply with the measure. This was the first time the city in terms imposed that duty upon the water company.

On June 8th the company commenced the present suit to restrain enforcement of the ordinance, and according to one of the assignments of error a temporary restraining order was granted, though this does not otherwise appear in the record. On the day following, the city adopted an ordinance repealing the one of May 30, 1917, and also passed a resolution rescinding all action taken under the ordinance so repealed, including the service of notice, and the city thereupon set up these facts both by special response and answer to the bill of complaint.

After so attempting to restore the situation existing prior to the ordinance of May 30th, the city on July 9th passed a resolution reciting the existence of an emergency concerning a permanent reconstruction proposed of a portion of Jefferson street and the laying of water pipes therein, and of a controversy as to whose duty it was to lay the connecting pipes between the mains and the property lines, and thereupon providing that the commissioner of public works should notify the water company to commence the laying and connecting of such service pipes, and, in the event of the company refusing or failing so to do, that the commissioner lay and connect such pipes, keeping an account of the cost, which it was further provided should be "charged and collected either from the water company or the private property owners as the courts may determine." Pursuant to the resolution notice was on the same day served by the commissioner upon the company, and the resolution and notice were made the subject of an amendment to the bill.

After hearing, the court entered a decree (December 13, 1917) adjudging in effect that the waterworks ordinance of 1884 constituted a contract between the city and the company; that this contract deprived the city of any right to compel the company to pay the cost of laying service pipes; that the ordinance of May 30th would impair the obligation of the contract in that it would impose upon the company duties and obligations not provided for and not within the power of the city to exact; that inasmuch as the ordinance of May 30th was in force from its date until the adoption of the repealing or-

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dinance of June 9th, which was after the suit was begun, some obligations under the provisions of the repealed ordinance might be claimed or attempted to be enforced by the city. And the city was perpetually enjoined from enforcing or attempting to enforce any portion of the repealed ordinance. For similar reasons the city was perpetually enjoined from executing or attempting to execute any provision of the resolution of July 9th as against the company, and the company was allowed its costs. The city appeals.

John K. Hendrick, of Paducah, Ky., for appellant.
D. H. Hughes, of Paducah, Ky., for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and COCHRAN, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). We do not see that the facts of the case, above in substance stated, present any question calling for decision. The grounds of the company's complaint are that the effect of the passage and enforcement of the ordinance of May 30, 1917, and the resolution of July 9th following, would be to impair the obligation of the water supply contract of 1884 and also to deprive the company of its property without due process of law. The repeal of this ordinance and rescission of the notice served under it rendered any inquiry into what the effect of its continuance and enforcement would have been upon the rights of the water company simply a moot question. It is the duty of courts to decide only real and pending issues, and not to pronounce judgment upon abstract propositions or moot questions, no matter how the opinion might affect future action in similar circumstances (Mills v. Green, 159 U. S. 651, 653, 16 Sup. Ct. 132, 40 L. Ed. 293; Richardson v. McChesney, 218 U. S. 487, 492, 31 Sup. Ct. 43, 54 L. Ed. 1121); and the question is none the less moot where legislation is the occasion of complaint and is repealed as here during pendency of the suit (Berry v. Davis, 242 U. S. 468, 470, 37 Sup. Ct. 208, 61 L. Ed. 441).

Furthermore, the resolution of July 9th presents a question of remote rather than present concern. The most that can be said of the measure is that in the event of its execution it would impose an obligation of an alternative character as respects the company and the property holders; for the resolution distinctly provides that the city itself shall at its own expense replace the service pipes in Jefferson street upon the mere refusal of the company so to do, and to look for reimbursement to the one or the other source of obligation according as the duty of replacement shall ultimately be judicially determined to rest upon the company or upon the property owners. Clearly, as respects any action that the city might bring against the company to recover the cost it had incurred in replacing the service pipes in Jefferson street, the defense so far as remedy is concerned would be plain, adequate, and complete at law.

It results that the decree must be reversed and the cause remanded, with direction to dismiss the suit; and inasmuch as the ordinance of May 30, 1917, was repealed, and the resolution of July 9th passed, after the suit was begun, the costs in this court will be equally divided

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(268 Fed. 23)

JEUNG BOOK HONG et al. v. WHITE, Commissioner of Immigration.*

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3145.

1. ALIENS ⟸32(13)—ADMISSION OF CHINESE—REVERSAL OF CONCLUSION OF IMMIGRATION BUREAU.

If, taking together discrepancies in the testimony of two Chinese applying for admission to the United States as sons of a native-born citizen, the executive officers of the Immigration Bureau and the Department of Labor found the evidence in support of the right to land and enter the United States was so impaired as to render it unsatisfactory, the court, on application of the Chinese for habeas corpus, is not authorized to reverse the conclusion.

2. ALIENS ⟸32(13)—EXCLUSION OF CHINESE—FINALITY OF ORDER OF EXECUTIVE OFFICERS.

Where the court cannot say that proceedings relative to the exclusion from the United States of two Chinese, claiming to be sons of a native-born citizen, were manifestly unfair, or that the actions of the executive officers of the Immigration Bureau or Department of Labor prevented fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute, the order of the executive officers within the authority of the statute is final.

3. ALIENS ⟸32(12)—QUESTIONS REVIEWABLE—OBJECTION NOT MADE BELOW OR ON APPEAL.

On appeal in habeas corpus proceedings by two Chinese, seeking admission to the United States as sons of a native-born citizen, a claim or objection as to the proceedings of the immigration officers, not set forth in the petition for the writ, and not made in the court below or on appeal, but made for the first time in the addendum to counsel's brief after submission of the case on appeal, cannot be considered, in the absence of a record presenting the proceedings referred to.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus proceeding by Jeung Bock Hong and Jeung Bock Ning against Edward White, as Commissioner of Immigration at the Port of San Francisco. From an order discharging the writ, and remanding petitioners for deportation, petitioners appeal. Affirmed.

Marshall B. Woodworth, of San Francisco, Cal., for appellants.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., and Ben F. Geis, Asst. U. S. Atty., of Willow, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from the District Court of the United States, denying petition for a writ of habeas corpus.

The appellants, Jeung Bock Hong and Jeung Bock Ning, two Chinese boys, 12 and 14 years of age, respectively, arrived at the port of San Francisco, Cal., on the steamship China May 8, 1917. They applied for admission to the United States as the sons of Jeung Mun Kee, who is a native-born citizen of the United States, and presented,

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*Rehearing denied October 14, 1919.

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as evidence of their right to enter the United States, affidavits of the father, Jeung Mun Kee, and a brother, Jeung Bock Shew, who had been previously landed in the United States, to wit, on or about July 24, 1916. Admission to the United States was denied appellants upon the ground that the relationship to the father Jeung Mun Kee, had not been satisfactorily established, by reason of a discrepancy between the testimony of the two boys.

It is claimed on behalf of the appellants that the action by the officers of the Immigration Bureau and of the Department of Labor in holding the appellants for deportation was an abuse of discretion committed to them by statute, and resulted in denying them a fair hearing, to which they were entitled under the law. The charge that there was a denial of a fair hearing and abuse of discretion by the officers of the Department of Labor is based mainly upon a discrepancy between the testimony of the petitioner Ning and his brother Hong, with respect to their home in a Chinese village.

Ning testifies that the house where they lived is joined to the houses on either side of it, while Hong testifies that there is a space between the houses of two or three feet. This discrepancy and other minor discrepancies lead the Commissioner General of Immigration to hold "that the applicants quite possibly are not brothers, as claimed, and that both (if either) are not sons of the alleged father," and, as a conclusion, the Commissioner General found that the applicants had "not established in the affirmative and satisfactory manner, which has always been required in this class of cases, that they are entitled to admission." The Assistant Secretary of Labor, upon the evidence, found that the "disagreement between the applicant and his brother regarding the houses of the home village—whether they touch or are separated by as much as two or three feet—causes a suspicion as to the probability of relationship," and thereupon the Assistant Secretary affirmed the excluding decision of the Commissioner General.

[1] The discrepancies in the testimony appear to be unimportant, but if, taking them altogether, the executive officers of the department found that the evidence in support of the petitioners' right to land and enter the United States was so impaired as to render it unsatisfactory, the court is not authorized to reverse that conclusion.

[2] We cannot say that the proceedings were manifestly unfair, or that the actions of the executive officers were such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In such cases the order of the executive officers within the authority of the statute is final. Low Wah Suey v. Backus, 225 U. S. 460–468, 32 Sup. Ct. 734, 56 L. Ed. 1165.

[3] It is next contended that this case comes within the decision of this court in the Case of Quan Hing Sun et al. (decided October 11, 1918) 254 Fed. 402, 165 C. C. A. 622. It was there established on behalf of the appellant, who was of the Chinese race, but a son of a native-born citizen of the United States, that, under the regulations prescribed by the Commissioner General of Immigration, a different procedure was pursued by the immigration officers in determining the right of the petitioner to enter the United States from that pursued

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under other statutory regulations for determining the right of persons other than those of the Chinese race to enter the United States. This objection was set forth in the petition for the writ of habeas corpus and established beyond question. Referring to such proceedings in detail, this court held that the method of inquiry pursued in that case was unfair to the petitioner, and reversed the decision of the District Court and directed further proceedings.

In this case no such claim was made in the petition for the writ of habeas corpus, and no such claim was made in the court below or on the appeal to this court. It was made for the first time in the addendum to counsel's brief after the submission of the case in this court. In the absence of a record presenting the proceedings referred to, it cannot be considered on appeal.

The decision of the District Court is affirmed.

(258 Fed. 25)

GRANCOURT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3249.

1. War ⇐4—War Powers—Houses of Ill Fame.

Under Const. art. 1, § 8, giving Congress the power to raise and support armies and make all laws which shall be necessary and proper for carrying into execution such powers, Act May 18, 1917, § 13 (Comp. St. 1918, § 2019b, appendix), authorizing the Secretary of War to do everything by him deemed necessary to suppress and prevent the keeping and setting up of houses of ill fame within such distance as he may deem needful of military camps, and making the keeping of any house of ill fame within the designated distance a misdemeanor, is valid.

2. War ⇐4—Houses of Ill Fame—Evidence.

In a prosecution for violating Act May 18, 1917, § 13 (Comp. St. 1918, § 2019b, appendix), by setting up a house of ill fame within the distance prescribed by the Secretary of War, testimony by police officers, repeating questions asked of defendant by soldiers as to character of her establishment, transactions with such women, etc., *held* properly admitted.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Blanche Grancourt was convicted of violating Act May 18, 1917, § 13, and she brings error. Affirmed.

Indictment charging violation of section 13 of the Act of May 18, 1917, c. 15, 40 Stat. 83 (Comp. St. 1918, § 2019b, appendix), and section 37 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]).

Sidney P. Robertson and Frank J. Henriessy, both of San Francisco, Cal., for plaintiff in error.

John W. Preston, Sp. Asst. Atty. Gen., and Annette A. Adams, U. S. Atty., and James E. Colston, Sp. Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

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MORROW, Circuit Judge. [1] The defendant is charged with a violation of section 13 of the Act of May 18, 1917, entitled "An act to authorize the President to increase temporarily the military establishment of the United States." 40 Stat. 76–83.

Section 13 (Comp. St. 1918, § 2019b, appendix) provides:

"Sec. 13. That the Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdyhouses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership or association receiving or permitting to be received for immoral purposes any person into any place structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or imprisonment for not more than twelve months, or both."

Under this authority, the Secretary of War has made a rule which provides that the keeping or setting up of houses of ill fame, brothels or bawdyhouses within five miles of a military camp, fort, post, training or mobilization place, being used for military purposes by the United States, is prohibited.

This law was enacted pursuant to the authority conferred by Congress by section 8 of article 1 of the Constitution of the United States "to raise and support armies" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

It is not the exercise of the police power of the state, but the constitutional authority of the United States. Pappens v. United States, 252 Fed. 55–57, 164 C. C. A. 167.

"The power to raise and support armies gives to Congress in wartime an authority over every branch of national life which is well-nigh unlimited. The events of recent years have shown this impressively. When an army is in training or in the field, every branch of commerce or industry, even the home life and habits of the people, may be placed under any necessary restraint to facilitate its 'support.'" The Government of the United States, by Munro, p. 268.

In a general demurrer to the indictment, it was objected that the indictment did not charge or state facts sufficient to constitute a public offense. It stated all of the essential facts to constitute the offense described in the statute and the order of the Secretary of War.

The particulars set forth were sufficient to inform the defendant of the nature and character of the charge and of all matters necessary to enable her to prepare her defense, and there was no defect in form. Sheridan v. United States, 236 Fed. 305, 310, 149 C. C. A. 437, and cases there cited.

[2] The admission of testimony of certain police officers repeating questions asked of the defendant by certain soldiers as to whether

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there were any women in the house, transactions with such women of an immoral character, and the testimony of the policemen that the occupation of the women in the house was that of prostitution was properly admitted as relevant, material, and competent under well-known rules of evidence.

The judgment of the District Court is affirmed.

(258 Fed. 27)

UNITED STATES v. COULBY.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3233.

1. STATUTES ⟸219—CONSTRUCTION OF INCOME TAX LAW—DEPARTMENTAL DECISION—CONFLICT.
   Where the Internal Revenue Department decided a question under the Income Tax Law two ways, neither decision can be given the effect usually given to an established practice of an executive department.
2. INTERNAL REVENUE ⟸7—INCOME TAXES.
   Under Income Tax Law 1913, a member of a partnership need not include as part of his net income, subject to tax, funds derived from or through the partnership, which has been received by the firm as dividends on stocks owned by it in corporations taxable on their net income.
3. INTERNAL REVENUE ⟸4—INCOME TAX ACT—CONSTRUCTION.
   In case of ambiguity in the Income Tax Act of 1913, the language is to be construed most strongly in favor of the taxpayer.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by Harry Coulby against the United States. There was a judgment for plaintiff, and the United States brings error. Affirmed.

The opinion of the District Judge is reported in 251 Fed. at page 982.

Joseph C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio.

A. C. Dustin, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. [1] This case presents the question: Whether the portion of a dividend which was paid on corporate shares to a partnership holding such shares as an asset, and which portion was ultimately paid to a member of the firm as his proportionate share of the firm's profits, was, within the true meaning of the Federal Income Tax Act of 1913 (Act Oct. 3, 1913, c. 16, 38 Stat. 114), net income in the sense that the corporation and the partner were each bound to pay thereon the normal tax of 1 per cent.; in a word, was it the purpose so to tax the same dividend twice? The question has been decided both ways in the Internal Revenue Department (Montgomery's Income Tax Procedure [Ed. 1918] pp. 231, 232); and hence the effect usually given to an established practice of an executive department

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charged with the execution of a statute has no present relevancy. The court below denied recovery, and the government brings error.

[2, 3] The facts of the case and the question involved, as well as the manner in which the issue was made and tried, are fully set out in the opinion of Judge Westenhaver; and in view of his discussion of the Income Tax Act of 1913, and of the effect upon that act of the later one of 1916 (Act Sept. 8, 1916, c. 463, 39 Stat. 756), an opinion here would not accomplish any useful end. We concur in and adopt the conclusion reached. However, the statement made in the opinion that a partnership has no legal existence, aside from the members who compose it, is too broad, as, for instance, in view of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. § 9585 et seq.]), yet as applied to the particular portion of the statute and the question in hand it is correct, and with this explanation we approve the reasoning of the opinion.

It may be added that, unless the construction placed on the statute by the learned trial judge is the natural and the rational one (38 Stat. pp. 166, 167, 169, 172), the language of the act is of such doubtful import as to require it to be construed most strongly against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 38 Sup. Ct. 53. 62 L. Ed. 211: Knowlton v. Moore, 178 U. S. 42, 47, 20 Sup. Ct. 747, 44 L. Ed. 969; State of Ohio v. Harris, 229 Fed. at pages 892, 898, 144 C. C. A. 174 (C. C. A. 6).

It results that the judgment must be affirmed.

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(258 Fed. 81)

THE J. C. REICHERT.

THE JAMES ROY.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 158.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by Anthony J. Golden against the steam tugs J. C. Reichert and James Roy, their engines, etc.; the Reichert Towing Line, Incorporated, claimant. Decree for libelant (258 Fed. 79), and claimant appeals. Affirmed.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

Park & Mattison, of New York City (Henry E. Mattison, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

(258 Fed. 81)

LEDERER, Collector of Internal Revenue, v. PENN MUT. LIFE INS. CO.*

(Circuit Court of Appeals, Third Circuit. May 23, 1919.)

No. 2399.

1. INTERNAL REVENUE ⟸7—INCOME TAX—LIFE INSURANCE COMPANIES—COMPUTATION OF GROSS INCOME.

The proviso in Income Tax Act Oct. 3, 1913, § 2, G (b), that in computing gross income "life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to such individual policy holder, or treated as an abatement or premium of such individual policy holder within such year," treats policy holders individually and separately, and not in mass, and a company may not exclude from its income a dividend paid to a policy holder, even though for redundancies in premiums previously paid, unless it has received premiums from him during the tax year, and then only to the extent of the amount of premiums so received from him, either actually or theoretically.

2. INTERNAL REVENUE ⟸7—INCOME TAX—LIFE INSURANCE COMPANIES—DEDUCTIONS FROM GROSS INCOME.

So-called dividends paid to policy holders by a mutual level premium life insurance company, consisting of excess premiums collected, are covered by the noninclusion clause of Income Tax Act Oct. 3, 1913, § 2, G (b), and may not be deducted from gross income in ascertaining net income under the deduction clause, as sums paid on "policy * * * contracts."

3. INTERNAL REVENUE ⟸7—INCOME TAX—LIFE INSURANCE COMPANIES—DEDUCTIONS FROM GROSS INCOME—"DIVIDEND."

Interest on redundancies of premiums for previous years, paid by a policy holder in a life insurance company and allowed to remain with the company under the contract, when paid to the policy holder, consti-

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*Certiorari granted 250 U. S. 656, 40 Sup. Ct. 14, 64 L. Ed. —.

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tutes a "dividend," within the meaning of Income Tax Act Oct. 3, 1913, § 2, G (b), providing for deduction from gross income of "the sums other than dividends paid within the year on policy * * * contracts," and may not be deducted thereunder.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dividend.]

4. INTERNAL REVENUE ⟸7—INCOME TAX—LIFE INSURANCE COMPANIES—DEDUCTIONS FROM GROSS INCOME—"DIVIDEND"—"SUM OTHER THAN DIVIDEND."

Under life insurance policies providing for payment to the beneficiaries in installments on death of insured, and for interest on deferred installments, interest so paid is not a dividend, but a "sum other than dividends paid * * * on policy * * * contracts," and deductible by the company from gross income, under Income Tax Act Oct. 3, 1913, § 2, G (b).

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by the Penn Mutual Life Insurance Company against Ephraim Lederer, Collector of Internal Revenue. Judgment for plaintiff, and defendant brings error. Reversed.

For opinion below, see 247 Fed. 559.

Francis F. Kane, U. S. Atty., and Ernest Harvey, Asst. U. S. Atty., both of Philadelphia, Pa., for plaintiff in error.

George Wharton Pepper, of Philadelphia, Pa. (Henry, Pepper, Bodine & Pepper, of Philadelphia, Pa., of counsel), for defendant in error.

Before WOOLLEY and HAIGHT, Circuit Judges, and MORRIS, District Judge.

HAIGHT, Circuit Judge. The defendant in error (the plaintiff below) sued to recover certain moneys which it claims were illegally assessed and exacted from it, by way of taxes for the year 1913, under the Income Tax Act of October 3, 1913 (38 Stat. L. 166, c. 16). The case was tried without a jury, pursuant to sections 649 and 700 of the Revised Statutes (Comp. St. §§ 1587, 1668), and resulted in a judgment in favor of the plaintiff for the full amount claimed.

[1] The questions presented depend for their decision upon the construction to be given to certain of the provisions of section 2, G (b), of the before-mentioned act. The plaintiff is a mutual life insurance company without capital stock, conducting its business on what is known as the "level premium plan," and annually declares "dividends" to its policy holders. In order to relieve this opinion of the burden of a discussion of the method by which premiums are fixed under the level premium plan, and how and out of what funds the so-called "dividends" to policy holders are declared, we refer to the explanation on pages 202, 203, of the opinion in Mutual Benefit Life Insurance Co. v. Herold (D. C. N. J.) 198 Fed. 199. That aptly describes the practice followed by the plaintiff in this case, except that a part of some of the dividends which enter into this controversy were derived from sources other than overpayment of premiums by the policy holders to whom such dividends were paid, as will be hereinafter set forth; but for present purposes the dividends in question

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may be considered as derived from and as representing the excess of the actual premium or premiums previously paid by a policy holder over the subsequently ascertained cost of his insurance for any given year or years. Such excess is included in the premium as a margin of safety, and is in insurance parlance called, and will be frequently referred to, as a "redundancy."

We deem it unnecessary to describe the different kinds of policies involved in this suit, or how and when and why the dividends accumulated and were payable thereon, respectively; it being, we think, sufficient merely to point out that during the tax year of 1913 (from March 1 to December 31, 1913) the plaintiff paid cash dividends—moneys actually paid, as distinguished from dividends used in abatement of subsequent premiums or to purchase paid-up additions to existing policies, etc.—aggregating in amount $683,729.03, to the holders of 10 different kinds of its policies, and that in many cases no premiums were received or due from the same policy holders that year, and in other cases the premiums received from such policy holders were less than the dividends paid to them, respectively. The company claimed the right to exclude the aggregate of those payments from its total income during that period, in order to ascertain the net income upon which, under the act in question, it was required to pay a tax. The government, on the other hand, took the position that the whole of this sum could not be so excluded. Out of these contrary views the present controversy arose.

The act imposed a normal tax "upon the entire net income arising or accruing from all sources" to every domestic insurance company. Subdivision G (a) of section 2. It also provided that the net income should be ascertained—

"by deducting from the gross amount of the income of such * * * insurance company, received within the year from all sources, * * * the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts." Section 2, G (b).

It then, after making special provisions in separate provisos for mutual fire insurance companies and mutual marine insurance companies, contained, in the latter proviso, the following:

"And life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to such individual policy holder, or treated as an abatement of premium of such individual policy holder, within such year."

The first of these clauses will, for convenience, be hereafter referred to as the "deduction" clause, and the latter as the "noninclusion" clause.

Leaving out of consideration for the moment, the grounds upon which the plaintiff contends that it is entitled to exclude those parts of the dividends paid to policy holders which do not represent the redundancies in the premiums previously paid by such policy holders, the plaintiff's before-stated contention is based on the proposition that under the "noninclusion" clause it may exclude from its total in-

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come (income derived from all sources) any moneys which it may have paid as dividends to policy holders during the tax year, provided that such payments represent redundancies in premiums previously paid by the same policy holders, irrespective of whether, during the tax year, it received anything by way of premium from them, respectively. The government's contention proceeds on the theory that dividends paid to a policy holder, or, for that matter, used in abatement of premiums or otherwise credited to a policy holder, may be excluded from the total income in any tax year only when the company has received a premium during the tax year from the individual policy holder to whom the dividend is paid, and then only to the extent of the amount of the premium so received, either actually or theoretically.

These divergent views result from the different interpretations given to the words "portion of any actual premium." The company would read these words as characterizing the source from which the dividend was derived; that is to say, it would permit the exclusion from the total income of dividends paid or credited to policy holders when they represent redundancies in previous premium payments, without regard to whether any premiums were received that year from the policy holders to whom the dividends were paid. The government, on the contrary, would read the words as limiting the extent or amount of the dividend paid or credited to the policy holder, which may be excluded from total income, to the sum received by way of premium from that same policy holder during the year in which the dividend is paid or credited to him, without regard to the source from which the dividend was derived or when it became payable. It is also manifest that under the company's interpretation it is necessary that the policy holders be treated as a whole, while under the government's contention each is dealt with separately.

Under the company's theory, if it received, for example, by way of premium, from all of its policy holders and from other sources, a total income, in any given tax year, amounting to the sum of $1,000,000, and paid to policy holders, from whom it received no premium whatever that year, dividends amounting to $100,000, and which represented redundancies in premiums previously paid by those same policy holders, it would report as its gross income $900,000, whereas in fact its actual gross income was $1,000,000. The result, of course, would be to produce an erroneous net income, because the latter would be based on a false gross income. Under the government's theory, the company would not be entitled to deduct any dividends paid to individual policy holders from whom it had not in that year received some premium, or at least a premium equal to the amount sought to be excluded as paid to him; in other words, if A., a policy holder, in 1913 paid no premium, but received a cash dividend representing redundancies in premiums paid by him in previous years no account would be taken of the dividend paid to him in that year, so far as the company's taxable income is concerned. It would be left out of the calculation altogether. On the other hand, if the company in that year had received premiums from A., B., C., D., etc., and had paid to each of them dividends representing redundancies in

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premiums paid in a previous year or years, which as to each individual policy holder was less than, or did not exceed, the premium received from each, respectively, during the tax year, the company would be entitled, in ascertaining its gross income, to exclude the aggregate amount of the dividends so paid that year to those policy holders. The result would be that the amount thus reported as gross income would represent the total of the amount actually received by way of premiums during the tax year. The learned trial judge adopted the plaintiff's theory.

Having thus ascertained the contentions of the respective parties, the theories upon which they are based, and the practical effect thereof, we now proceed to an analysis of the language of the statute, in the light of existing statutory enactments and judicial interpretation thereof at the time the act in question was passed. It will be noted, primarily, that the act, so far as life insurance companies are concerned, provides two distinct steps in the ascertainment of the taxable net income, viz.: (a) The ascertainment of gross income; (b) the deductions to be made from gross income to ascertain net income. In ascertaining gross income, it is specifically provided that certain parts of any actual premium received from any individual policy holder shall not be included, and after the gross income has thus been ascertained, the net income upon which the tax is to be assessed is arrived at by deducting various items, among which are the sums, other than dividends, paid within the year on policy and annuity contracts. This distinction was recognized by the company in making up its return for the tax year in question, because all of the moneys now in controversy were deducted from the company's total income for the purpose of ascertaining gross income, and were not deducted from gross income for the purpose of ascertaining net income.

The original Corporation Excise Tax Act of 1909 (36 Stat. 112, c. 6, § 38), which, so far as it imposed a tax upon the "entire net income," was, in all respects material to this case, the same as the act of 1913, authorized insurance companies to make the same deductions from their gross income, to ascertain their net income, as does the "deduction" clause of the act in question; but it contained no such clause as the "noninclusion" clause of the act of 1913. For many years before the act of 1909 was passed, it had been the policy of life insurance companies, both mutual and stock (when the latter issued participating policies) doing business on the level premium plan, annually to declare "dividends" to policy holders, which represented, as before mentioned, the difference between the premium provided in the policy to be paid and the actual cost of the insurance. The companies permitted the insured to use these dividends in any one of several ways, viz. as an abatement of future premiums, in purchasing paid-up additions, withdrawal in cash, etc. When dividends were used in abatement of premiums, it was clear that the company actually, as distinguished from theoretically, received, in the year in which the abatement was made, not the full amount of the premium charged and payable under the policy, but only the difference between the dividend and the premium; and so in respect to full-

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paid additions, while the company received the full premium due and chargeable under the policy, it did not actually receive the dividend as premium on the paid-up addition to the policy.

The result was that the companies sought, in making their tax returns under the act of 1909, to charge themselves only with the moneys actually received in the tax year, and thus to eliminate from their gross income those dividends which, as a matter of bookkeeping, they appeared to have received that year, but actually did not receive. The government, on the other hand, contended that those dividends were such "dividends" as, under the act, the companies were not permitted to claim deduction for, and that they must therefore be included as part of their gross income. The question thus presented first came up for judicial decision in Mutual Benefit Life Insurance Co. v. Herold, supra, and in a well considered and reasoned opinion the late Judge Cross adopted the contention of the insurance companies. His decision was affirmed by this court on January 27, 1913 (Herold v. Mutual Benefit Life Ins. Co., 201 Fed. 918, 120 C. C. A. 256), and the Supreme Court later denied a certiorari to review it (231 U. S. 755, 34 Sup. Ct. 323, 58 L. Ed. 468). Thus by judicial construction one feature of the "noninclusion" clause of the act of 1913 had already been incorporated in the act of 1909 when the later act was passed; i. e., that insurance companies were not required to include in their gross income such part of the premiums payable by policy holders as they had not actually received, but which had been pro tanto abated by the application of dividends. It is proper to here observe incidentally that dividends could not be used in abatement of a premium of a policy holder unless a premium was due from that policy holder, greater or at least equal in amount to the dividend.

On October 3, 1913, the act in question was passed, and in it the "noninclusion" clause appeared for the first time. Reading the "noninclusion" clause in the light of the before-mentioned contentions and the history of the litigation thereon, and bearing in mind that, so far as insurance companies are concerned, the deductions permitted to be made from gross income to ascertain net income were the same in the act of 1909 as in the act of 1913, it seems reasonable to conclude that the "noninclusion" clause was inserted for the purpose of setting at rest (which had not been authoritatively done when the act was passed, because the petition for the certiorari was not denied until December 15, 1913), the contention which the government was making in these matters, and to indicate clearly that it was not the intention of Congress to assess a tax in any given year on such parts of premiums as the company received only in theory during that year, but exclusively on that part of the premiums which they actually received—that which in fact, not in theory, came in to them. It will also be seen by reference to the decision of Judge Cross in the Mutual Benefit Case (198 Fed. 204) that where policy holders withdrew their dividends in cash the total amount of the premium payable under the policy was included in the plaintiff's statement of income received and the tax was imposed thereon by the government;

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and the plaintiff in Conn. General Life Insurance Co. v. Eaton (D. C.) 218 Fed. 188, 203, appears to have done the same.

It would therefore appear that, when Congress used the words "paid back" in the noninclusion clause of the act of 1913, it made that act more liberal to the insurance companies, so far as "dividends" paid in cash were concerned, than the previous act had been construed even by the insurance companies. It took another step, and treated a "cash dividend" just as the courts had previously treated a dividend used as an abatement of a premium. It will be observed that the noninclusion clause provides that life insurance companies "shall not *include* as income in any year." Congress did not say that life insurance companies might "deduct" from the total income in any year, etc. It used the words "shall not include." The word "include" carries with it the implication of something received, either actually or theoretically. It is difficult to understand how one may be relieved of including in his receipts something which he never received. How could an insurance company not include in gross income certain moneys paid out to policy holders, if there were no premiums paid by those policy holders that year from which to exclude them? Furthermore, Congress did not say that a life insurance company should not include "such portion of any actual premiums received," etc., but it used the word "premium"—the singular.

To adopt the plaintiff's construction necessitates the reading of the word "premium" as "premiums," in nearly every payment involved in this suit, unless it should be held that Congress intended to permit the deduction of such part or portion of only one previously paid premium as represented a redundancy in such premium. But no reason for such a limitation is conceivable. The words "that year," which the plaintiff contends must be read into the clause after the word "received," if the government's construction is adopted, we think are there by implication, because of the use of the word "premium," instead of "premiums" and the words "shall not include." Furthermore, the act directs that life insurance companies shall not include such portion of the premium received "from any individual policy holder" as shall have been paid back or credited "to such individual policy holder or treated as an abatement of premium of such individual policy holder." It seems quite clear, by the use, thus conspicuously, of the words "individual policy holder," that Congress manifested an intention to treat each policy holder separately—his premium and his dividend—and not all of the policy holders as a whole; the aggregate premiums and the aggregate dividends. In this connection it may be observed that the company keeps a separate account with each policy holder.

If the purpose of inserting the "noninclusion" clause in the act of 1913 was as before stated, then it seems apparent that Congress used the language that it did, advisedly, for that language quite as explicitly expresses the thought that a life insurance company was to be taxed only on the income which it actually received, as distinguished from theoretically, in any tax year, as it is inappropriate to convey the meaning which plaintiff seeks to gather from it. If Congress

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had intended that the aggregate of all dividends, representing redundancies in previous premium payments, paid to policy holders in a tax year, should be deducted from the aggregate premiums received from all policy holders in that year, without regard to whether premiums were received that year from all of the policy holders to whom dividends were paid that year, it would not, we think, have used the words "shall not include," but rather the word "deduct"; nor the word "individual," qualifying the words "policy holder," and would have used the word "premiums" instead of "premium." The manifest reason why a difference is made in respect to dividends paid or credited to policy holders which do not exceed the premium received from the same policy holders during the tax year, and those which are in excess thereof, or in respect to those cases where no premium is received from the policy holder to whom a dividend is paid, and those cases where a premium is received, is that Congress desired to tax only the moneys actually received during the tax year, and not those theoretically received, as the government had been contending up to that time.

The plaintiff seeks to support its argument on the proposition that as the moneys paid back to policy holders represent previous excess premium payments upon which, in fact or in theory, the company has theretofore paid a tax, it is unreasonable, in the absence of clear and explicit language to that effect, to presume that Congress intended that they should be taxed again. But this argument loses sight of the fact that no tax whatever is levied on a dividend, other than the initial one imposed when the premium of which it is a part is paid. No tax was imposed for 1913, for instance, on the moneys paid back to policy holders as cash dividends in that year. The tax would be assessed only on such part of the moneys received by the company during that year as premiums from policy holders as was in excess of the dividends paid to the same policy holders that year. On the other hand, to permit the cash dividends, in excess of moneys received, either actually or theoretically, as premiums from the policy holders to whom they are paid, to be deducted in 1913, would relieve the company from paying any tax whatever upon them, because by deducting them from gross income in that year it would nullify or neutralize to that extent the tax which had been imposed upon the premiums, of which they were a part, in previous years. It is thus apparent that what plaintiff really seeks to accomplish is, not to avoid double taxation, but to be relieved from paying any tax whatever upon such parts of premiums, no matter when paid, as represent redundancies, and which are subsequently returned to the policy holders who paid the premiums.

It may be entirely equitable and just that Congress should have adopted such a course, but we do not think that we would be justified in finding such intention in a statute which expressly provides that the tax shall be levied "upon the entire net income arising or accruing from all sources," in the absence of a clear expression to that effect, and especially when to do so would necessitate a strained and unnatural construction of the language used by Congress. Moreover,

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immediately preceding the clause in question are those dealing with mutual fire insurance companies and mutual marine insurance companies. The provision in respect to the latter is as follows:

"Provided, further, that mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policy holders on account of premiums previously paid by them, and interest paid upon such amounts between the ascertainment thereof and the payment thereof."

The language there used is quite different from that used in respect to life insurance companies, and the meaning to be gathered from it is clear. It specifically permits those companies to make the very deduction, as deductions, which the plaintiff claims that life insurance companies may make by way of noninclusion. The fact that there is such a marked difference in the language used in respect to the two kinds of companies, and each respectively conveys a different meaning, tends to strengthen the conclusion that so far as life insurance companies were concerned, they were, in ascertaining gross income, to exclude payments or credits to policy holders in the tax year only to the extent of the amounts received, actually or theoretically, from the same policy holders, respectively, during the same year. The same deduction and noninclusion clauses were carried into the Income Tax Act of 1916 (Act Sept. 8, 1916, c. 463, 39 Stat. 756), and later into the act of 1919 (Act Feb. 24, 1919, c. 18, 40 Stat. 1057). The distinction between the two clauses is accentuated in the latter act, as they are placed in separate and distinct sections. Section 233 and section 234. Section 233, which defines gross income, specially provides that in the case of life insurance companies "there shall not be included in gross income such portion," etc., using the same language as the act of 1913; that mutual marine insurance companies must include in gross income the same items as the act of 1913 required, but it makes no mention of what either kind of company may deduct. Section 234 deals with deductions exclusively, and permits the same deductions for life insurance companies (paragraph 11) and for mutual marine insurance companies (paragraph 12), as did the act of 1913.

It therefore appears that Congress has in each revision of the income tax law which it has made since 1913, retained the same language, as respects both life insurance companies and mutual marine insurance companies, as it did in the original act. It is a reasonable conclusion, therefore, that the language used in the act of 1913 was advisedly used, and, as it is different in respect to the two kinds of companies, that Congress intended that there should be a difference in the sums which each could, respectively, deduct on account of previous excess premium payments. That the construction for which we have indicated a preference is the correct one is, we think made more manifest when the action of Congress in using the same language in the act of 1919, as it did in the acts of 1913 and 1916, is considered in the light of the regulations issued by the Treasury Department under the act of 1916. Regulations No. 33, issued January 2, 1918. Those regulations were as follows:

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"*Premium Income Paid Back.*—Life insurance companies are authorized to omit from gross income such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to the policy holder or treated as an abatement of his premium.

"The amount authorized by this provision to be excluded from gross premium income on account of any premium refunded to any individual policy holder is explicitly limited to an amount not in excess of the actual premium paid by the individual policy holder within the tax year.

"*Cash Dividends.*—Life insurance companies are entitled under the foregoing holding to exclude from gross income any part of the premium received which is paid back to the individual policy holder within the same return year. Where the dividend is in excess of the premium received, there can be excluded from gross income only the amount of the premium received from such individual policy holder within the same return year."

It must be presumed that Congress, in passing the act of 1919, had in mind the construction which the Treasury Department, in its regulations and instructions to internal revenue collectors, had adopted, and that, if such construction did not properly express the intention of Congress, a change in the language, to express clearly a contrary meaning, would have been made in the act of 1919. Indeed, the Senate committee which had the act of 1919 in charge recommended a new basis for the taxation of life insurance companies, but in conference the Senate receded therefrom, and the basis upon which life insurance companies had been theretofore taxed was continued. See Montgomery's Income Tax Procedure 1919, p. 669.

This situation is then presented: If the construction sought by the plaintiff is followed, although an equitable result would, in one aspect, be therefore accomplished, it would be done only by a strained construction of the statute, and one, indeed, which would not be in harmony with what we think Congress, by the language which it used, manifested as its intention and confirmed by its subsequent action. If, on the other hand, the construction urged by the government is adopted, a reasonable result is reached, which gives effect to what, it may be properly assumed, was the intention of Congress, namely, to tax as the income of life insurance companies in any year only so much of any premium as may have been actually received, as distinguished from theoretically, from any policy holder during that year. In this contingency, there is, of course, no question as to which construction should be adopted. We conclude, therefore, that the plaintiff was not entitled to exclude from its total income during the tax year in question, for the purpose of ascertaining its gross income, any dividends paid or credited to policy holders from whom it did not receive any premium during that year, and as to such policy holders as it did receive premiums from that year it was entitled to exclude only such part of the dividends paid to those policy holders as did not exceed the amount received from them, respectively, by way of premiums, during that year.

[2] Although plaintiff has not contended, except as to items of interest paid to policy holders (which feature of the case will be hereafter referred to), that it is entitled, in ascertaining its net taxable income, to credit for the dividends paid to policy holders, on the theory that such dividends may be "deducted," as distinguished from

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"not included," under the "deduction" clause, we have, nevertheless, considered that question. It might readily be conceived that dividends paid to policy holders, representing as they do excess premiums, are paid "on policy * * * contracts." It may also be conceded that such dividends are not "dividends" in the commercial sense, as representing profits. Whether the word "dividends" is used in the "deduction" clause in the commercial sense, or in the sense in which insurance companies ordinarily use it, we do not feel called upon to decide. If it be assumed, however, that the dividends in question are "sums * * * paid * * * on policy * * * contracts," and that they are not dividends in the commercial sense, and that the statute in the clause in question refers to only commercial dividends, it might be argued with force that insurance companies are entitled to deduct them, under the "deduction" clause, from gross income, to ascertain net income, were it not for the noninclusion clause. At the threshold of any such argument, however, we would be met with the fact that dividends paid or credited to policy holders are unquestionably covered by the "noninclusion" clause. Manifestly, if it had been the intention of Congress that these dividends could have been deducted under the original "deduction" clause, there would have been no reason for adding the "noninclusion" clause. Indeed, by the latter, Congress explicitly defined what moneys returned, either in cash or by credit, to policy holders might be excluded by the companies, in ascertaining their taxable net income. Consequently we do not think that any of the cash dividends paid by the plaintiff to its policy holders in the tax year in question, which represented redundancies in previous premium payments, were deductible as "sums other than dividends paid within the year on policy * * * contracts."

[3] Up to this point we have dealt with only those parts of the cash dividends as represented redundancies in previous premiums paid by the same policy holder to whom the dividends were paid. It appears, however, that some of these dividends represent, in part, interest which had accumulated on dividends which had been left with the company under certain forms of policies, and, in part, also on some policies, the share of the policy holders to whom the dividends were paid in funds accruing to holders of the same kind of policies, which for one reason or another had been forfeited, and which, under the terms of the policies, were divided among those policy holders of the same class who had not thus forfeited such benefits. The company claims that it is entitled (although it did not follow that course in making up its tax return) to deduct from its total income, to ascertain the taxable net income, such parts of the dividends as represent interest due to the policy holders, under the "deduction clause" of the statute, as payments made on policy contracts. It also claims the right to exclude from its total income the parts which represent shares of forfeitures, upon the ground that the sums forfeited, and which are divided among the persisting policy holders, represent redundancies in the premiums paid by those policy holders who forfeited their right to the return of such redundancies. Hence it is argued that, under its construction of the words "portion of any actual premium," such

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sums are portions of actual premiums theretofore received, and deductible as such, irrespective of whether they originally came from the policy holder to whom the dividend is paid.

Under the construction which we have given to the statute, as long as the dividends paid or credited to any individual policy holder within the tax year do not exceed the amount paid by way of premium by that policy holder during that year, it is quite immaterial from what source or sources the dividend paid or credited arose. Hence the independent question regarding the right to exclude such parts of the dividends as represent shares in the forfeitures of other policies is of no moment. However, as it is sought to procure credit, through the "deduction clause," for the parts which represent interest, it is necessary to ascertain whether such interest payments fall within that clause. Under all of the policies involved in this suit, with one exception, the rate of interest allowed to policy holders on redundancies which were left with the company, and not withdrawn by the policy holder every year, was, in reality, dependent upon the earnings of the company upon its investments. Without attempting to decide, as before stated, because we find it unnecessary to do so, whether the word "dividend" is used in the deduction clause in its commercial sense, as distinguished from the insurance sense, we think that such interest payments are dividends in the commercial sense, as they clearly are in the insurance sense. They represent the policy holders' pro rata share in the earnings on the company's investments over a given period of time, and, as respects most of the policies involved in this suit, they are the result of compound interest. Hence they may not be deducted under the deduction clause.

[4] The one exception above referred to is the interest paid on what have been termed in the testimony "trust certificates." These moneys are not paid to policy holders, but to the beneficiaries under installment policies, which provide for the payment of the face of the policy, not in bulk on the death of the assured, but in installments extending over a period of years. The fund thus left with the company, which, of course, diminishes from installment period to installment period, draws interest, and the interest is then paid to the person entitled to the installments. It is accordingly, in neither an insurance nor a commercial sense, a dividend, but is a sum paid on a policy contract, and as such we think deductible under the "deduction clause" of the act. It appears from the record that, although all of the dividends in controversy were paid in cash to the policy holders, the company, during the tax year in question, received premiums that year from some of the policy holders to whom such dividend payments were made. The government concedes the right of the company to recover the tax paid on such part of the dividends paid to policy holders during the tax year as does not exceed the premiums received that year from the same policy holders, respectively, as it does the tax on an item of $2,774.35, which was inadvertently not included in the original return of the company. The actual amount which the government concedes that the plaintiff is entitled to recover is, however, we think, excessive, because it includes the sums received from holders of "life rate endowment policies" and holders of "ac-

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celerated endowment policies," which were considerably more than the sums paid to them, respectively, during that year by way of dividends. Manifestly the company is only entitled in those cases to credit for the amount paid.

As the aggregate amount received by way of premiums from policy holders of the policies in question during the tax year was much less than the amount paid to them by way of dividends, and as judgment was awarded in the court below for the tax assessed on the total amount of dividends paid, it follows that the judgment must be reversed, and a new trial granted.

(258 Fed. 93)

UNITED STATES v. VALLEY LAND & INVESTMENT CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5122.

1. PUBLIC LANDS ⇐120—CANCELLATION OF PATENT—GOOD FAITH OF ENTRYMEN—EVIDENCE.
In suit by the United States to cancel defendants' patents to certain lands, evidence *held* not to show that defendant entrymen, at the time of filing upon said lands, entered into an agreement by which the title to their respective pre-emption lands would inure to any other person in whole or in part.

2. PUBLIC LANDS ⇐130—PRE-EMPTION—DISPOSITION BEFORE FINAL PATENT.
The pre-emption statute (Rev. St. § 2262) did not require at time of making final proof, as it does at time of filing, that claimant make an affidavit to the effect that application is not made for the use or benefit of any other person or persons, and claimant had full power to dispose ad interim of his claim upon final issue of patent; the motive of applicant at time of final proof being irrelevant.

3. PUBLIC LANDS ⇐120—CANCELLATION OF PRE-EMPTION PATENT—GROUNDS.
In suit by the United States to cancel defendants' patents to certain lands on the ground that defendant entrymen in their affidavits and proofs falsely represented that lands were for their own exclusive use and benefit, the inquiry of the court could not extend beyond the good faith and truth of the statements required by Rev. St. § 2262, of the entryman at time of making entry.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by the United States against the Valley Land & Investment Company and others. Judgment for defendants, and the United States appeals. Affirmed.

Harry B. Tedrow, U. S. Atty., of Boulder, Colo., and John A. Gordon, Asst. U. S. Atty., of Denver, Colo.

John R. Smith, of Denver, Colo., for appellees.

Before SANBORN and CARLAND, Circuit Judges, and ELLIOTT, District Judge.

ELLIOTT, District Judge. This is an action by the United States, plaintiff, against the Valley Land & Investment Company, a corpora-

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tion, Louis E. Kenworthy, Myron L. Meehan, Robert Ryan, Ballentine R. Bohart, Louis W. Stenborn, and Hugh Moreland, defendants, and is a suit in equity, brought for the cancellation of the defendants' patents to certain public lands situated in the state of Colorado.

The cause of action stated by the plaintiff is, in substance, that on and prior to the issue of its patents to the lands referred to in the bill of complaint the plaintiff was the owner thereof, as part of its public domain, and such lands being subject to entry and acquisition under the provisions of the public land laws; that during the year 1913, and on the dates in the bill set out, defendant Kenworthy procured and induced defendants Meehan, Ryan, Bohart, Stenborn, and Moreland each to file in the United States land office for that district a pre-emption declaratory statement, declaring his intention to claim the lands embraced in such statement as a pre-emption right under the public land laws relating to pre-emption claims, and procured them, thereafter, each to file in the said land office an application to purchase the tract described in the said declaratory statement, and also to each file the required affidavits and proofs in support thereof, and to pay the officers at the land office the required fees and purchase price of said land, and procured each of them to otherwise apparently comply with the provisions of said pre-emption laws, and thereby procured the allowance of the entry of said lands and the issue of patents therefor by plaintiff's proper officers.

The date of the filing of said respective pre-emption statements, applications to purchase, allowance of said entries, and the issue of said patents are set forth, and as to the defendant Meehan such dates are as follows: Pre-emption declaratory statement filed May 16, 1913, with the description of the land; allowed by register's final certificate of entry issued January 3, 1914; and patent issued March 30, 1914, conveying title to said land to said Meehan. Similar allegations cover the pre-emption claims patented under the public land laws to the other defendants.

It is further alleged that in said affidavits and proofs so filed in said land office in support of the respective applications of said defendants to purchase, in the respective proceedings in said land office upon which the allowance of said entries were based and the patents issued, each of said entrymen stated, represented, and made to appear, among other things, that said application to purchase said land so embraced in his said pre-emption statement was made by said entryman to appropriate the same to his own exclusive use or benefit, and that he had not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever by which the title to said land which he might acquire from the plaintiff should inure in whole or in part to the benefit of any person except himself.

It is further alleged that by means of said statements, representations, and apparent compliance with the provisions of said laws, relating to pre-emption claims, and not otherwise, said entrymen induced the plaintiff's officers to allow the entry of said lands so applied for and issue final certificates of entry and patents embracing such lands.

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It is also alleged that said statements and representations, so made by the entrymen defendants, respectively, were, at all times mentioned in the bill of complaint, false and untrue, and known by the defendants to be false and untrue, in that it was not true that said respective entrymen applied to purchase the lands embraced in said pre-emption statements and applications to purchase, for their own exclusive use and benefit, and in that it was not true that each of said respective entrymen had not directly or indirectly made an agreement with any person or persons whomsoever by which the title to said lands which he might acquire from the United States should inure in whole or in part to the benefit of any person except himself. It is alleged that, on the contrary, at and prior to the time of the filing in the land office by each of the said entrymen of his pre-emption statement, at and prior to the filing in said office by each of said entrymen of his application to purchase the land embraced in said pre-emption statement, and at all the times during said proceedings in said land office, upon which the allowance of each of said entries and the issue of each of said patents was based, in truth and in fact each of said entrymen defendants had an understanding and agreement with said defendant Kenworthy that, when title to said land so applied for had been procured from the United States, a part of said land, to wit, 150 acres thereof, would be by said entryman conveyed to the defendant the Valley Land & Investment Company or to the person or persons designated by defendant Kenworthy, and by reason of the premises plaintiff was defrauded of the title to each and every tract of the lands described in the bill of complaint.

It is thereupon alleged that Meehan now claims to be the owner of the land described in the patent issued to him, a part thereof being subject to a certain mortgage in favor of the defendant the Valley Land & Investment Company, with similar allegations as to the other defendants, with certain differences that are not material.

The plaintiff thereupon prayed that the said patents be cancelled, and that each of the conveyances or instruments based upon said respective entries and patents purporting to effect the title to said lands or any part thereof be cancelled, and that the defendants are and each of them is, without title, claim, or interest in or to said lands or any part thereof; that the plaintiff be decreed the owner of said lands as part of its public domain, free of any claim or incumbrance whatsoever.

Thereupon the defendants answer jointly, in substance admitting that the company defendant is a corporation; that the plaintiff was the owner of the lands mentioned, prior to the issue of patents therefor; that the same were public lands, subject to entry and acquisition only under the provisions of the public land laws, and not otherwise. They further admit that each of the several entrymen named as defendants in the bill of complaint filed in the United States land office for that district the pre-emption declaratory statement referred to in the bill of complaint, and that the register's final certificate of entry was, in due course and upon the dates alleged, allowed, and that patents were duly issued by the United States to the respective defendant entrymen, as alleged in the bill of complaint.

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The defendants further admit that the affidavits and proofs filed in the said land office, referred to in the bill of complaint, were of the usual and ordinary form required by plaintiff to be made by entrymen to purchase lands embraced in pre-emption declaratory statements, and contained the usual and ordinary provisions prescribed by law and the rules of the Department of the Interior for final proof, and allege that they were sufficient to entitle the said entrymen and each of them to final certificate of entry, and finally to patent embracing the lands described in the bill of complaint.

The defendants admit that said entrymen, at the time and as a part of said applications to purchase, and upon which said respective patents were issued, made representations with reference to appropriation of the same to their own use, respectively, and that they had not made any agreement or contract with any person or persons by which the title to the lands embraced in said entry would inure to any other person, in whole or in part.

The defendants further admit that by and through such representations and compliances with the provisions of the statute, and the rules and regulations, the defendants took the various steps with reference to said pre-emptions, and allege that neither at the time of filing of their declaratory statements nor at the time of submitting their final proofs had such entrymen, or any of them, made with the defendants or any one else any arrangement, contract, or agreement contrary to or inhibited by any of the rules of the department or plaintiff's public laws.

Defendants specifically deny that they or any of them ever or at all made any contract or agreement with the entrymen or either of them which were fraudulent or unlawful, or which tended wrongfully or illegally to deprive the plaintiff of any of its public lands.

It is thereupon alleged that the defendant the Valley Land & Investment Company, on the 29th day of November, 1912, entered into an agreement in writing with the Sam Farmer Escalante Irrigation Company, whereby the said defendant purchased of said company water rights from its system, estimated to be sufficient for irrigating 1,280 acres of land under the irrigation system of the Sam Farmer Escalante Irrigation Company; that said company was then in the hands of a receiver in an action pending against it, and that in the settlement of said action said company, with funds secured from this defendant company, settled with its creditors and secured the relinquishment of certain lands under its said system, theretofore filed upon and improved by their said creditors, and to induce the Valley Land & Investment Company to purchase its said water rights from this company, to file upon said lands, and to enjoy the benefit of the improvements theretofore made by the former entrymen; that good land, susceptible of irrigation under said system, is limited in area, and the holders of water rights desire the same to be applied to the lands susceptible of irrigation and available under said system, and that this defendant company might thus better assure the application of the said water to the reclamation of said lands this defendant company entered into an agreement with the several entrymen defendants

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for the sale of its said water rights, which contract, after formal recitals, and reciting the ownership of this water and that the entryman defendant was desirous of purchasing water rights for lands proposed to be filed on by him under the laws of the United States, recites:

"Now, therefore, it is agreed between the parties hereto that the said first party will, and by these presents does, sell to the second party water rights for the irrigable portion of said lands, to wit, for ——— acres, described above and mentioned to be filed upon by said second party, same being ——— portion of the water rights purchased by said first party from the Sam Farmer Escalante Irrigation Company, said first party reserving the right to substitute the water contract of the new company; that the price to be paid for said water right is $75 per acre, or an aggregate amount of $———, and which said sum and indebtedness is to be evidenced by a collateral note, secured by said water rights on the proportion of said system as aforesaid, and which said note shall be paid upon the making final proof on said land and receiving receiver's receipt therefor, in manner following, to wit: One-half at the time of making final proof and securing receiver's receipt therefor, and one-half in five years, at 6 per cent. interest per annum, secured by trust deed on said lands and water rights."

It was then provided that the second party would forthwith file upon the lands; that he would do all the things required to comply with the laws of the United States with reference thereto; that he would make final proof upon the land, and when final proof was made, and receiver's receipt therefor secured, that he would secure that portion of the purchase price remaining unpaid, as above provided, by the deed of trust and note.

It was provided in said contract, in substance, that if said party of the second part should be unable to pay one-half of the purchase price at the time of making final proof, and if he so elected, he might convey 140 acres of said land and the water right acquired by him from the first party, exclusive of the water right for the 20 acres of said land retained by him, which said conveyance of land and water right to said party or its nominee would be in complete satisfaction and payment of the purchase notes held by the first party; and it was further provided that the second party's selection of his 20 acres of land should be made from the outer boundary of said land and by legal subdivision thereof, and so as to leave the 140 acres in most compact body.

It was further agreed that as further security for the payment of the purchase price of said water right until title should be procured to said land as provided therein, and to insure the further performance of the contract by the party of the second part, as well as any advances made or to be made by any person to aid the carrying out of the provisions of the contract, the second party would execute and deliver to defendant Kenworthy a power of attorney to assure the faithful performance of the contract.

It is then alleged that, after the selection of their several tracts of land for entry by the defendants, they severally purchased from this defendant such water rights, by contract in form as above stated, as were sufficient to irrigate and reclaim the estimated irrigable portion of each of their several tracts and in compliance with the provisions

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of said agreement, in the form above referred to, each of said entrymen gave to the defendant Investment Company their collateral notes for the amounts set forth in the pleadings, by which said collateral notes the water rights purchased by each entryman were pledged as security therefor, until said purchase price should be secured by mortgage upon the lands.

There was also a further agreement set forth in the answer, alleged to have been entered into by each of the defendants Ryan, Bohart, and Stenborn, with the defendant Kenworthy, in substance, that, reciting the desire of the defendants severally to procure financial aid to develop, improve, and patent said lands, it was agreed, in consideration of the advances which should be made by defendant Kenworthy, the same should be repaid upon procuring title or receiver's receipt therefor, together with interest on such sums as should be advanced, or in lieu and in satisfaction of said payment the defendant entryman might convey 10 acres of said land and water rights to the said Kenworthy, and it was provided that such contract should constitute a lien or mortgage upon said lands and water rights prior to all other liens, save and except the lien or claim of the Valley Land & Investment Company for the purchase of the water rights, for the amount of said advances and interest, until said advances were fully paid and discharged, with an immaterial interlineation in the contract of defendant Stenborn; that each of the defendant entrymen executed a power of attorney in favor of the defendant Kenworthy to sign and execute any and all papers and instruments necessary and requisite to fully and effectually carry into effect the provisions of the contract above referred to.

It is then alleged that none of said entrymen elected to convey any of their said land under the provisions of said contract either to the defendant Investment Company or defendant Kenworthy, but that each and every of said defendant entrymen secured the purchase price of their said water rights by a mortgage on their several tracts of land, respectively, after making final proof, and elected to exempt from the lien of said mortgage 20 acres of said lands and water rights.

It is further alleged that the powers of attorney were given only to insure the faithful performance of their several contracts, and that nothing was ever done or attempted to be done under or pursuant to said powers of attorney; that neither of said contracts, agreements, or instruments, jointly or severally, contemplated the alienation of said land by said entrymen or any of them, but that all of said contracts and agreements reserved to said entrymen and each of them the full and complete ownership and control of their said several tracts of land, respectively; and that the entry of each of said entrymen was in fact made for his sole use and benefit, and not for the use and benefit of any other person.

It was further alleged by the defendants that they did not have among themselves any other agreement or understanding than that contained and expressed in their said contract above referred to, and had no other understanding or agreement than those, with any other person or persons.

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The defendants deny that any affidavits, statements, or representations made by them or either of them in their applications to purchase, or in any of the proceedings in relation to said lands and procuring patents therefor, were false, or that any statements made by said entrymen or any of them were known to be false or fraudulent when the same were made, or at any other time.

It was thereupon admitted that the several defendant entrymen claimed to be and are the owners of the several tracts of land embraced in their several entries. It is further admitted that the defendant the Valley Land & Investment Company has and holds mortgages as mentioned in the plaintiff's bill of complaint, and also that the same and each and all thereof were given for a good and valid consideration and are valid and subsisting liens, and they do not in any manner affect injuriously any of the plaintiff's rights or titles.

Defendants further allege that the only interest which the defendant Louis E. Kenworthy has in said property is by virtue of said agreement hereinbefore set forth for the repayment of advances made to the several defendants by the said Louis E. Kenworthy, the right to the enforcement of which is contained in the terms and provisions of said agreement.

It is thereupon alleged that none of the contracts or agreements were contrary to the rules of the department nor inhibited by the laws of the United States, and that all of the acts of the defendants and each of them in relation to the lands mentioned in plaintiff's bill and all the contracts and agreements made and entered into with the said entrymen were done and made in accordance with and pursuant to the ruling of the Commissioner of the General Land Office and agreeable to the laws of the United States and rulings and findings of the courts in reference thereto; and said acts and doings and said contracts and agreements were done and made by said entrymen, and each and every of them, without any intention of violating the laws of the United States and in the belief that all said acts and doings were authorized by the Department of the Interior and the laws of the United States relating thereto, and upon their denial of all manner of wrongdoing charged in said bill of complaint, prayed that they might be dismissed hence with their costs.

Upon the trial of the issues presented by the pleadings, the allegations of the plaintiff and of the defendants, so far as they refer to the transactions between the defendants that were in writing, were admitted. Judgment was entered in favor of the defendants.

[1] The question presented involves the intent and purpose of the parties to these contracts with reference to the control, ownership, and title of public lands embraced within the pre-emption filings of the several defendants. The real issue was as to the good faith of these entrymen, with their codefendants, and whether or not the entrymen at the time of filing upon said lands entered into an agreement or understanding by which the title to their respective pre-emption lands would inure in whole or in part to any other person.

The first question is: Are the contracts, set forth in the answer, contrary to the provisions of the statutes of the United States, and

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are they prohibited either by the spirit or the letter of said statutes? A determination of this issue involves a consideration of the written instruments themselves, independent of the circumstances under which they were executed, under the first assignment of error, to wit:

"The court erred in sustaining defendants' objections to, and in refusing to admit in evidence, the affidavit of nonalienation required of, and filed by each of the entrymen in support and as a part of the pre-emption final proof submitted by each of them on the entries for which the patents in question issued * * *"

—which affidavits involved the good faith provisions of the statute of the United States to the effect that no agreement or contract in any manner or way, with any person or persons whomsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself.

Our judgment is that the trial court did consider this affidavit, and that his holding amounted to a finding that the same was immaterial, rather than that it would not be received, as evidenced by his plain expression with reference thereto in the record, to wit:

"I feel very clear in my own mind that there was no act of fraud on the part of these entrymen, and if this affidavit were admitted it would not change my view in that respect."

Bearing in mind that this affidavit in question was an affidavit required by the rules prescribed by the department and made a part of the final proof, it is interesting to consider what the courts have said with reference to nonalienation statutes applicable to government land. In Adams v. Church, 193 U. S. 510, 24 Sup. Ct. 512, 48 L. Ed. 769, the court was considering the provisions of the Timber Culture Act (Act June 14, 1878, c. 190, 20 Stat. 113), and the rules and regulations promulgated by the Commissioner of the General Land Office, and Justice Day there recites that—

"It appears that Adams made the entry under the Timber Culture Act before the partnership agreement was entered into, and there is nothing in the record to show that, in taking the preliminary oath required by the statute, he acted otherwise than in good faith, and stated the truth as to the situation and his purposes in making the entry. As recited in the title, the purpose of the act is to encourage the growth of timber on the western prairies. * * * Section 2 of the act (20 Stat. 113) requires the person applying for the benefit of the law to make affidavit that he is the head of a family; * * * that the entry is made for the cultivation of timber for the exclusive use and benefit of the applicant; that the application is made in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that affiant intends to hold and cultivate the land and to comply with the provisions of the act. * * *"

He thereupon recites the provisions of the statute with reference to the time given for the issuance of final certificate and patent and the provisions of his proof that shall entitle him to a patent. The record showed a sale of an interest in this land to another as a partner, before final proof and the contention was that the same was void as against public policy. The court recites:

"It is pointed out that the final affidavit, required by the rules and regulations of the General Land Office made under authority of section 5 of the

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act, is to be in the same terms as the preliminary one, and requires the claimant to make oath that his entry was made in good faith, and not for the purpose of speculation or indirectly for the benefit of any other person whomsoever."

It was then argued that the fact that this sale of an interest by the claimant to another, his partner, before final proof, brought the case within the reasoning and the spirit of Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272. The court goes on to distinguish between the provisions of the Homestead Law and the Timber Culture Act; that in the case last cited it was held that a court of equity would not grant a decree for specific performance of an agreement to sell the interest of the homesteader made after settlement and before the oath is filed for final certificate; and further stated:

"But the Homestead Act specifically requires that the applicant shall make affidavit before entry is made that it is for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of any other person. Rev. Stat. § 2290 [Comp. St. § 4531]. Further, the *final proof* [the italics are ours] requires affidavit by the applicant that 'no part of such land has been alienated, except as provided in section 2288' [section 4535]—Rev. Stat. § 2291 [section 4532]—which section limits the right of alienation to 'church, cemetery or school purposes, or for the right of way of railroads.'"

Justice Day thereupon holds that the Anderson Case construes the two provisions of the Homestead Law and states his analysis of the purpose of the Homestead Law, and the necessity for the provision requiring the affidavit at the time of final proof. He then emphasizes the fact that the policy of the government to require such affidavit at the time of final proof, when it intends to make it a condition precedent to granting title, was indicated in the provisions of the homestead act itself, and, further, that it could readily have been pursued by the same provision in the Timber Culture Act, if it was the intent to extend the principle to that statute.

Thereupon, in conformity with the decisions of the Land Department in the cases therein cited, the right of the timber culture entryman to dispose of his holdings, acquired by him in good faith, before final certificate, is fully recognized. It is further held that:

"If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. Myers v. Croft, 13 Wall. 291 [20 L. Ed. 562]."

Justice Day thereupon closed the opinion:

"To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject."

[2] A comparison of the Timber Culture Act (20 Stat. 113) and the pre-emption statute (section 2262, Revised Statutes), in so far as

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the provisions of the laws refer to the nonalienation affidavit, discloses that they are similar, and that there is not an express provision that such affidavit shall be made at the time of or as a part of the final proof, or that the issuance of a patent shall be dependent upon such facts; while in the Homestead Law, as recited in the above case, it is specifically recited not only that the affidavit shall be made as to the purpose and intent and good faith at the time of the entry, but that it shall also appear by affidavit at the time of final proof and before patent issue. We therefore think it entirely consistent, in an interpretation of the intent and purpose of the Congress in the enactment of the provisions of the pre-emption statute, to apply the same rule that is announced in the case above cited by the Supreme Court of the United States.

In this view of the requirements of this pre-emption statute, the affidavit offered by plaintiff below being an affidavit that was made and filed at the time of the making of the final proof, in compliance with the requirement of the Commissioner, exacting such additional statement at the time of final proof, is invalid. Williamson v. U. S., 207 U. S. 459, 28 Sup. Ct. 176, 52 L. Ed. 278. In this case Justice White, in considering the provisions of the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [Comp. St. §§ 4671–4673, 4988, 10216]), said of the necessity for the affidavit required by the rules of the Commissioner to be made and filed as a part of the final proof:

"When the context of the statute is thus brought into view, we are of the opinion that it cannot possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at the final hearing, of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifests were intended to be excluded therefrom."

Adams v. Church, supra, is cited, and the court proceeds to consider whether it was within the power of the Commissioner of the General Land Office, under its construction of this statute, to enact rules and regulations by which an entryman would be compelled, at the final hearing to do that "which the act of Congress * * * excluded," and thereby "to deprive the entryman of a right which the act by necessary implication conferred upon him." It is then held that the concluding portion of section 3 of the Timber and Stone Act (Comp. St. § 4673) provided:

"Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

But:

"This power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred"

—and that, as there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, he was under no obligation to make such an affidavit, and had full power to

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dispose ad interim of his claim, upon the final issue of patent, the motive of such applicant at the time of the final proof was irrelevant.

[3] This, we think, is particularly applicable to the situation here, and therefore the inquiry of the court could not extend beyond the good faith and the truth of the statements in the affidavit required by the provisions of the law of the entryman at the time of making his entry. In this view the trial court did not err in holding that it was not an affidavit required by statute in the making of the final proof, and that it did not relate to the time of the inquiry, limited by the statute to the time of making the entry.

Upon the determination of the first issue upon the strict construction of the written contracts, it was immaterial, and we understand that the court so held. We think, however, that the trial court took the broader view of the duty to determine the question of fraud, upon the ground and for all of the reasons stated, and as a matter of fact did consider the affidavit as one of the acts performed by the defendants with reference to securing the title to said premises, to be given such weight, if any, as the court found it entitled to.

Conceding the right of these defendant entrymen to make contracts with reference to this property after the time of the entry and the filing of the affidavit required by the statute, we think it clear that a reference to the instruments themselves, alone, fails to establish want of good faith or the falsity of the affidavit in the particulars complained of in the bill of complaint.

Even though the contracts themselves are not contrary to the provisions of the law by their express terms, and therefore are not prohibited thereby, is the real intent and purpose of the entrymen and the other defendants revealed by a consideration of all of the facts and circumstances surrounding the making of the pre-emption filings? The manner in which the defendants are shown to have been interested in making the filings; the circumstances of the defendant entrymen; their attitude toward the lands embraced in their respective entries prior to and after patent; their control or lack of control of such lands; their exercising dominion over them, independent of the other defendants; the manner in which the entrymen finally elected to and did settle for the water rights—do all these things, considered with the written contracts themselves, show that these five entrymen defendants were induced by the Investment Company and its president, Kenworthy, to go upon these lands and locate them for the benefit of said company, and therefore that the affidavits of nonalienation were false, and that the patents to the lands were fraudulently obtained?

A determination of the issue thus presented requires a consideration, not only of the written contracts, but also the testimony of the various witnesses produced by the plaintiff in support of its allegation of fraud.

Robert Ryan, one of the defendants, was sworn by the plaintiff, and testified that he was 77 years old, that he made one of the pre-emption filings in question, and when asked to state the circumstances leading up to the making of the filing, he said, in substance, that it

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was a simple matter, that he was looking for a chance to locate some land. He met with misfortune, and was looking for something, and heard that Kenworthy had some water rights; that he went to see the latter, and his talk with him was brief. He asked him if there was an opportunity to get some land and was told there was; did not talk much, but asked Kenworthy when he was going, and if he could go along with him, and, when the time came to go, the latter told the witness to be there, and he was there, and they went upon the land. The testimony of this witness was that the defendants Bohart, Moreland, Stenborn, and Meehan went over to the land with lumber belonging to Kenworthy; that he built a house on his claim; that the other four went onto their respective selections, and they stayed upon the land about seven months.

The witness Hugh Moreland, one of the defendant entrymen, testified, in substance, to the same effect, and he stated, with reference to any arrangements with the defendant Kenworthy or the Investment Company:

"Q. Well, did you have any arrangements whatever with Mr. Kenworthy before you went over there? A. What kind of arrangements?

"Q. I want any kind. A. Well, the arrangements were I was to get 10 acres of land with paid-up water right. I was to give him a mortgage on this 150 acres for this water."

We deem it unnecessary to refer to the specific statements of the other witnesses for the defendants, the import of which is consistent with the foregoing, and which in substance recites that these entrymen made their own selections and filed upon the land; that their attitude toward the land was that of owners, and there is no substantial evidence of intent or purpose that the land or any part of it was taken for the benefit of Kenworthy, or the defendant Investment Company. The entrymen controlled the land to the exclusion of any one else; they exercised dominion over it, and went so far as to give option sales to parties other than these defendants Kenworthy and the Investment Company.

The best proof of the intent and purpose of the parties to the transactions, and especially of the defendant entrymen themselves, is the manner in which they finally elected under the contract to and did settle for the water right by giving their notes and mortgages upon the tracts, respectively, reserving to themselves 20 acres, with the water right thereto, from the mortgage.

There is no intent or purpose shown on the part of the defendants Kenworthy or the Investment Company to exercise any control or dominion over the land. There is no testimony that sustains the conclusion that they wanted the land. They had the water to sell, and were looking for purchasers, as they had a right to do. The land of the plaintiff, without water, is practically worthless. The water is the thing of real value. Certainly it is not to the discredit of the entrymen that they were willing to purchase from or to the discredit of the company or its president to be willing to sell the water to these entrymen. That the price was reasonable is shown by the testimony of the different witnesses. That the water was worth what they were agree-

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ing to pay for it, or what the defendant company and its president are to have out of it, is conceded. They have a mortgage upon 140 acres of land, and is it to the discredit of the company that it conceded to these indigent entrymen the advantage of 20 acres of land free and the water right therefor free of the lien of the mortgage? Can it be said that there was a fraudulent intent and purpose to give to the defendant company an interest and title to a part of the land in the fact that the entrymen protected themselves against the uncertainty of being able to pay for the water and thus losing the whole of the land, if the mortgage covered it? We think rather that it is to the credit of this water company that it was willing to sell its valuable right to these indigent entrymen and take as their security a mortgage upon the 140 acres and the water right thereto.

It is suggested that the giving of the mortgage to secure the notes, after the final proof, was an attempt to evade the statute, and, taken together with the contracts, shows the original intent of the parties to violate the good-faith and nonalienation provisions of the statute. With this we cannot agree. On the other hand, we think it demonstrates the fairness of the Investment Company and Kenworthy. It emphasizes the right of these entrymen to elect to give no security, but the mortgage, for the entire amount due upon the water contracts. The plain terms of these contracts, with all of the facts and circumstances attending the transactions, including from the first knowledge that the entrymen had that there were lands there upon which they could file, down to the final act of the giving of the note and mortgage to secure the same; all unite in establishing the simple situation of the defendant company and its president, Kenworthy, having water for sale, with a right and a desire to sell the same, and the entryman in a perfectly legitimate, honorable way taking advantage of the opportunity, being treated with the utmost fairness, finally closing the transaction of the purchase of the water right by giving the note and mortgage after final proof—all consistent with his rights as an entryman, and in entire harmony with the provisions of the Pre-emption Law under which the entry was made.

Finally, the plaintiff insists that there is a conflict in the statements of the different witnesses that cannot be reconciled with the honesty of the transaction. Admitting that inferences might be drawn from some of the evidence, some of the facts and circumstances in the case, that would indicate an intent and purpose to violate this provision of the Pre-emption Law, the position of the trial court becomes especially important. After seeing, personally, the witnesses, observing their demeanor upon the witness stand, having an opportunity to judge of the character and stability of the men, he finds:

"These gentlemen impressed me as honest men, as substantial citizens. * * * The men did not hesitate to tell the whole story—both the entrymen and Mr. Kenworthy. I think it was an honest transaction."

The record discloses substantial evidence to sustain the findings of the trial court, and we find no obvious error in the application of the law or mistake in the consideration of the facts.

The judgment of the trial court is affirmed.

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(258 Fed. 106)

MONTE RICO MIN. & MILL. CO. et al. v. FLEMING et al.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5037.

1. ACTIONS ⟸50(2)—JOINDER.
Minority stockholders, who asserted that they had been induced to purchase their shares through the fraud of the promoter of the corporation, cannot join actions personal to them with actions against the majority shareholders on which the corporation alone could sue.

2. CORPORATIONS ⟸320(13)—ACTIONS BY MINORITY STOCKHOLDERS—INJUNCTION.
In a suit by minority stockholders against the corporation officers and others for an accounting for corporate funds that came into the hands of individual defendants and for cancellation of corporate obligation and mortgages on the ground that they were taken fraudulently and without consideration, an order temporarily enjoining foreclosure or disposition of the mortgages is proper.

3. CORPORATIONS ⟸320(13)—ACTIONS BY SHAREHOLDERS—RELIEF.
Where there was no contention that a corporation was not legally organized, or that it was insolvent, *held* that, in a suit by minority shareholders for cancellation of corporate obligations and mortgages on the ground that they were taken fraudulently and without consideration, the complete stoppage of corporate affairs is unnecessary, and a decree enjoining foreclosure or disposition of the mortgages should not enjoin the corporation from employing any person on a salary other than a watchman; thus stopping all corporate affairs.

4. CORPORATIONS ⟸320(13)—STOCKHOLDERS—RIGHTS OF.
The right of a stockholder to sell his stock is one of the commonest incidents, and such disposition should not be enjoined in a suit by minority shareholders against the promoter and organizer of the corporation who it claimed misrepresented the number of shares he received, etc., where it did not appear that the promoter was not the owner of the shares with all lawful rights implied by such ownership.

5. CORPORATIONS ⟸320(13)—BOOKS—INSPECTIONS.
In a suit by minority stockholders who were denied access to the corporate books, an order providing that they should be allowed access to the books is sufficient in the first instance, and the books of the corporation should not be ordered by mandatory injunction to be deposited in court for inspection of the parties.

Appeal from the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Bill by Thurston W. Fleming and others against the Monte Rico Mining & Milling Company and others. From an order granting an injunction, etc., defendants appeal. Order modified, and, as modified, affirmed.

Lawrence R. Boyd, of Lynchburg, Va. (A. W. Morningstar and E. H. Mitchell, both of Lordsburg, N. M., on the brief), for appellants.

W. C. Reid, of Albuquerque, N. M. (J. M. Hervey and E. C. Iden, both of Rosewell, N. M., on the brief), for appellees.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. Certain minority stockholders of the Monte Rico Mining & Milling Company sued the company, its officers, its

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majority stockholders, and others, for a receiver, an injunction, and an accounting. This appeal by defendants is from an order granting an interlocutory injunction and other temporary relief.

The company was organized by defendant Lawrence R. Boyd, his father and another, under the laws of Arizona, with an authorized capital of 500,000 shares of the par value of one dollar each. At the first meeting of the incorporators, a board of directors was chosen, and on the same day Boyd proposed to sell to the company certain mining claims in New Mexico in consideration of its entire capital stock; he to donate to the company 200,000 shares thereof for its treasury. The proposition was accepted and carried out, and the records of the company showed the transaction. The idea was to make all of the stock fully paid and to use the shares in the treasury to raise funds for development.

[1] The plaintiff stockholders acquired treasury shares sold by an agent employed by the company for that purpose. Part of the causes of action stated in the complaint are based upon alleged fraudulent representations, by Boyd personally, to induce the sale of the stock to them. It is averred that he represented that he had retained but 100,000 shares, that the remaining 400,000 were in the treasury, and that he (Boyd) was to serve as president without salary; that Boyd transferred the 300,000 shares retained by him to his wife and his father without consideration and to deceive and defraud creditors; that he caused dummy directors to be elected and irregular meetings of the stockholders and directors to be held; that of $40,000 or more received from sales of treasury stock he converted over $25,000 to his own use and refused to account for it; that the plaintiffs were denied the right to inspect the books and records of the company; that Boyd fraudulently caused the execution to himself and his brother of obligations of the company and mortgages securing them upon all its property without consideration; and that they were about to enforce them, etc. Without attempting to recite all the averments of the voluminous complaint, it is quite apparent that it proceeds upon the erroneous assumption that all controversies growing out of the organization and operations of the company and also individual dealings in its stock may be determined in a single suit. Plaintiffs have joined causes of action against Boyd personal to themselves with causes of action that are enforceable only by or on behalf of the corporation. Upon motion of defendants, the trial court dismissed three paragraphs of the complaint relating to the sale of the mining claims by Boyd for the entire capital stock, his donation of 200,000 shares to the treasury of the company, and his alleged fraudulent representations to induce the stock purchases by the plaintiffs. Aside from irrelevant averments, what remained were causes of action in the company which are properly assertable by stockholders in its behalf upon compliance with the conditions prescribed by Equity Rule 27 (198 Fed. xxv, 115 C. C. A. xxv). The order of the trial court appealed from may be briefly stated as follows: It denied the application for a receiver, but in lieu thereof, upon the giving of a bond by plaintiffs, enjoined the company, its officers and agents, from transacting any corporate business, and required it to deposit all its books, papers, and records with the

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clerk of the court for inspection by the parties. It enjoined Boyd and his wife from disposing of the stock standing in their names upon the company books, and, in the case of the former, also the stock belonging to him but appearing in the names of others. It enjoined Boyd and his brother from foreclosing or disposing of the mortgages given by the company; and it enjoined the company from employing any person upon a salary other than a watchman with compensation not to exceed $50 per month.

[2, 3] Reduced to its proper dimensions, the suit is by stockholders for and on behalf of their corporation: First, for an accounting of corporate funds that came into the hands of individual defendants; and, second, for cancellation of company obligations and mortgages on the ground that they were taken fraudulently and without consideration. A recasting of the complaint with a clear observance of the equity rules would be helpful. In the above view, the order temporarily enjoining foreclosure or disposition of the mortgages is right; but we think the balance of the order appealed from should be vacated. There is no contention that the company was not legally organized and is not still an existing corporation with present corporate capacities. Nor is it charged that the company is insolvent. Moreover, this is not a suit for winding up its affairs. A complete stoppage of its operations is not a requisite remedy for the wrongs in issue.

[4, 5] Again, with the dismissal of the three paragraphs of the complaint it cannot be said that Boyd did not become the owner of 300,000 of the 500,000 shares of the stock of the company with all the lawful rights implied by such ownership. The right of a stockholder to sell and transfer his stock is one of the commonest incidents. The consideration of the transfer may be attacked in a proper proceeding by creditors sufficiently equipped, but the conditions are not present here. Again, those who hold the 300,000 shares of stock issued to Boyd for the mining claims are obviously majority stockholders. Their powers over the affairs of their corporation and the limitations upon those powers are too familiar for recital here. It may be said, however, that unless otherwise prescribed by statute any stockholder has the right to inspect the books of the corporation of which he is a member, for proper purposes and under reasonable regulations as to time and place. A denial of the right necessarily implies a remedy, and in Guthrie v. Harkness, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. Ed. 130, 4 Ann. Cas. 433, a judgment was entered requiring defendants to permit inspection by plaintiff. If a case might be so extreme as to justify a court in impounding the books of a going corporation to enforce the right of inspection, which we do not decide, we do not think the one at bar reached that stage. An ordinary order would doubtless prove sufficient, or, if not, a mandatory injunction.

The order appealed from is modified by vacating the several parts thereof excepting that enjoining the disposition or foreclosure of the mortgages given by the defendant company to individual defendants, and as so modified it is affirmed.

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(258 Fed. 109)

NATIONAL METAL EDGE BOX CO. v. AGOSTINI.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 104.

NEGLIGENCE ⟸51—CONDITION OF PREMISES—CARE AS TO TRESPASSERS—CHILDREN.

Defendant *held* not chargeable with negligence in not maintaining a fence or barrier between a canal and a roadway alongside, both of which it owned, which rendered it liable for the death of a boy five years old, who, when playing on the roadway, as was customary and known to defendant, threw a stick upon the ice in the canal, and again into a hole in the ice, and while attempting to recover it was drowned; there being no evidence that children played on the ice with defendant's knowledge.

In Error to the District Court of the United States for the District of Vermont.

Action at law by Victor A. Agostini, administrator of Livio Franceshetti, against the National Metal Edge Box Company. Judgment for plaintiff, and defendant brings error. Reversed.

Melville P. Maurice, of Brattleboro, Vt. (Robert C. Bacon, of Brattleboro, Vt., on the brief), for plaintiff in error.

Robert E. Healy, of Bennington, Vt., for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The defendant in error, in his representative capacity as administrator, brought this action under sections 2839, 2840, of the Vermont Public Statutes, to recover for pecuniary loss to the next of kin of the decedent because of his death by drowning. It is claimed his death, on March 22, 1915, was caused through the negligence of the plaintiff in error.

Plaintiff in error owned and maintained a manufacturing plant at Readsboro, Vt. In connection therewith, it owned and maintained an artificial open ditch or canal, which was filled with flowing water and which was made use of in its business. It maintained a road on the westerly bank of this canal, which had been used by the public for years prior to the day in question. There was no barrier or fence between the canal and the road. Its plant was on the easterly side of the Deerfield river, which flows in a southerly direction. The canal, estimated to be between 900 and 1,200 feet in length, was located somewhat east of the river, and extended in a direction parallel to the river from a dam across the river on the north, to the penstock or headworks of the water power plant of the factory on the south. It conveyed the water impounded by the dam to the penstock or head works. The roadway was 11 or 12 feet wide and the canal about 50 feet wide. Both roadway and canal were controlled by the plaintiff in error. The roadway was built in order to transport logs to the plant on sleighs and wagons. From this roadway, logs were dumped into the canal for storage. Defendant in error conceded the roadway was not a public highway. There were houses between the canal and the river. These houses were approximately parallel to the canal and the roadway on

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the canal embankment. The decedent lived in the fourth house from the north end of the row of houses. The houses fronted east toward the canal. There was a public highway between the front row of houses and the canal embankment, which extended from the last house toward the south, and past the house where the decedent lived. There was a footpath from the roadway down to the seventh house in the row, which had been used habitually by the residents of these houses.

Prior to the repair to the roadway on the bank of the canal, made by the plaintiff in error, there was a fence consisting of four strands of wire between the roadway and the canal, but on the day of the accident, as stated above, there was no barrier or fence. On the day of the casualty, water was running in the canal, but there was some ice over the top, with two or three holes therein. The decedent, a boy five years of age, was playing a game with a stick sharpened at one end and called a "nipsie." While located on the side of the roadway furthest from the canal, he threw his nipsie out on the ice on the canal; he then went down to the canal bank onto the ice, picked up his nipsie from the ice, and threw it into the water in a hole in the ice, and, while trying to get the "nipsie" out of the water, fell in and was drowned.

It appeared, further, that for years prior people habitually crossed the roadway down the bank of the canal, and some walked along the roadway. Children, including the decedent, frequently played in the roadway near the canal, and plaintiff in error's foreman knew of such practice. Liability is sought to be imposed upon the theory that the canal was attractive to young children, and that they had, with the knowledge of the superintendent, been habitually playing about the canal. The court submitted the issue to the jury, permitting it to find the plaintiff in error negligent in not erecting bars along the banks of its canal, so that young children living in that vicinity, and who it knew were accustomed to travel or play on the banks of the canal, would not get in and drown.

There was no evidence of an express invitation. Defendant in error relies upon an implied invitation, because the premises were an attractive place for children.

The exception to the rule of law that the landowner is not responsible for injuries except when occurring through willful fault or conduct toward persons, upon his premises, who come there without permission, is found in the so-called attractive nuisance cases. Railroad Co. v. Stout (17 Wall.) 84 U. S. 654, 21 L. Ed. 745; Union Pacific v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434.

This doctrine has found approval in the federal courts and, since this action was tried in the federal court, the rule prevailing there, rather than the rule prevailing in the Vermont state court, will be adopted. The Vermont courts have refused to follow the doctrine of the "turntable" cases.

While the frequent use of the roadway by nearby residents and workers in the factory might be said to constitute an invitation for the public generally to use the roadway, still this did not constitute

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a license by invitation for them to go into the water or upon the ice of the canal. The decedent, on the occasion in question, was not attracted in play to the canal. He intentionally left the roadway, seeking to recover his "nipsie," after having thrown it upon the ice. After picking it up, he threw it again into a hole in the ice, and, while trying to recover it, fell in. While there is abundant evidence indicating a frequent use of the roadway, there is no evidence that children played on the ice on the canal with or without the knowledge of the plaintiff in error. The theory of liability imposed in the so-called "turntable" cases and persons who are invitees upon private property, is that as to such persons the owners are required to keep the premises in reasonably safe condition. New York Co. v. Pusey, 211 Fed. 622, 129 C. C. A. 88. Attractiveness of the road or invitation to play thereon cannot be said to include the canal.

The decedent was not moved by temptation, if any, offered by the ice upon the canal or its attractiveness to play thereon, but by his wish to recover his "nipsie." Therefore we need not consider what effect might be given to a situation where children have played in the neighborhood or upon the canal and without objection from the plaintiff in error, or occasions when they have sometimes been ordered away. Temptation to play is not an invitation. Erie R. Co. v. Hilt, 247 U. S. 101, 38 Sup. Ct. 435, 62 L. Ed. 1003. The temptation, on this occasion, to leave his place of play, and to run out upon the ice upon the canal to recover his plaything, can in no sense be said to be either due to an invitation or a nuisance which attracted children.

We are of opinion that there was no obligation requiring plaintiff in error to fence the canal, and therefore failure so to do would not be a basis upon which to predicate negligence. We therefore think the court erred in refusing to direct a verdict as requested, to which exception was duly taken.

Judgment reversed.

(258 Fed. 111)

NEW YORK CENT. R. CO. v. LLOYD.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 191.

APPEAL AND ERROR ⇐1066—QUESTIONS FOR JURY—SUBMISSION OF ISSUE UNSUPPORTED BY EVIDENCE.

In action for death of passenger, killed when train started suddenly while he was alighting at a dark station, submission to jury of question of defendant's negligence in failing to provide sufficient train crew with other issues *held* prejudicial error, where there was no evidence of such insufficiency and a general verdict for plaintiff was returned.

In Error to the District Court of the United States for the Southern District of New York.

Action by Mary P. Lloyd, as administratrix of Victor C. Lloyd, against the New York Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

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Alexander S. Lyman, of New York City (William Mann, of New York City, of counsel), for plaintiff in error.

Gormly J. Sproull and Hugh M. Harmer, both of New York City, for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On December 6, 1917, the deceased, Victor C. Lloyd, was a passenger on plaintiff in error's train, and intended to alight at its station at Little Ferry, N. J. The plaintiff in error leases the West Shore Railroad Company and maintains this station. When the train approached the station, the deceased got up, waited inside the car until it came to a stop, and then went out on the platform. When the deceased reached the platform, there were other people attempting to alight therefrom. He proceeded to the lower step while the car was at a standstill, and when about to step on the station platform, holding the rail of the car with his right hand and a bundle with his left, the car started forward, causing him to be swung around and fall to the platform, and roll between the platform and the wheels of the train.

The witness who described the movement of the car said it started with a jerk and that he was thus swung. The train, after proceeding a short distance, stopped. Some 20 or 25 passengers alighted from the train. At the place where the deceased attempted to alight, the platform was dark and the station was not lighted. There was no brakeman on the platform of the car from which the deceased alighted, nor was there upon the station platform at the place of the accident. The crew consisted of two trainmen, a baggageman, and the conductor, and the conductor says it was a full crew. There were six cars on the train, all of which carried passengers. Each car was approximately 55 feet in length. The conductor says the car was started forward, at the time of the accident to the deceased, in response to his signal, which he in turn received from a brakeman in the rear.

The evidence presented a question of fact as to whether or not those in charge of the train were negligent in failing to give the deceased a reasonable opportunity to alight from the car before starting it forward in response to the signal given by the conductor.

The District Judge submitted four questions of fact to the jury, upon which there might be predicated negligence on the part of the employés in charge of the train. The first was the failure of the plaintiff in error, in its duty to the deceased, in not stopping a sufficient length of time at the station at Little Ferry to permit passengers to alight; second, to predicate negligence upon the failure to sufficiently light the platform where the passengers, including the deceased, were attempting to alight from the cars; third, to predicate negligence in starting the train in an improper and negligent manner, by a jerk and sudden start, causing the deceased to be thrown from the platform of the car, down between the station platform and the trucks or steps of the passing train, with which he came in collision and caused his death; and, fourth, that there was not a sufficient crew—"that the crew was inadequate for that train, carrying that number

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of people, and there should have been provided by the defendant company more brakemen or flagmen stationed along on the train, so as to advise passengers, and see that passengers had time and opportunity for alighting before starting the train."

The verdict of the jury was a general one, and it is therefore not known whether the jury found the plaintiff in error negligent in respect of all the claims of negligence submitted to them, or any one or several of them. There was no evidence adduced in behalf of the defendant in error, indicating that it was the custom or practice upon railroads of like character, engaged in passenger service, to provide more than a conductor, baggageman, and two trainmen for six-car trains. On the other hand, the evidence of the plaintiff in error indicated that this was a full crew, and that a crew of this kind was customarily used in such service. The court charged the jury:

"Again as to the lack of sufficient care: Railroad companies have not got to hire a man for each platform. I don't think any of them do that, and you would measure the requirements of this railroad company according to what other railroad companies do. According to the standard adopted by companies that use reasonable care for the safety of their passengers. This company would be only required to carry such a number of train crew as ordinarily would be safe in watching at one end of the train to another, and giving the signals that passengers were all on or all off, and that it was safe to start. So, if they had such a number, that would be sufficient; but if you find that there was an inadequate and insufficient number to safely look after the boarding or alighting of passengers, then the defendant might be responsible in that respect for this man's death."

To this counsel for the railroad company excepted in the following language:

"I would like to take an exception to your honor's ruling with respect to the number of employés on the train and submitting to the jury the question of whether or not the defendant was negligent in not having more employés on that train.

"The Court: I think it is a question of fact, in view of all the testimony, of what was the proper number of the crew.

"Counsel: It seems to me that there is no testimony to the contrary that there was a full crew on that train. I don't recall any.

"The Court: But there is testimony as to where these men were, and whether they could have seen and properly safeguarded passengers in alighting, and whether the defendant was required, or not, to carry more crew for the train under the circumstances of this particular road, of carrying such a number of passengers and dropping them in such quantities in different places, and whether or not there would be imposed on the railroad company the duty of carrying a crew of several people, so as to safeguard the passenger trains at such stations as this one.

"Counsel: I take an exception."

The difficulty with the position of the defendant in error is that there was no evidence indicating negligence in the failure to provide a larger number as a crew of the train. There was no showing of the custom or practice to be other than that which prevailed on the night in question in the handling of this train. In the absence of some such evidence, we think it was error to permit the jury to exercise their own unaided judgment as to whether or not the crew was sufficient. D.,

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L. & W. Co. v. Donahue, 238 Fed. 770, 151 C. C. A. 620; N. Y. Central Co. v. Banker, 224 Fed. 351, 140 C. C. A. 37.

We think this error involved a substantial right of the plaintiff in error and requires a reversal of the judgment appealed from.

Judgment reversed.

(258 Fed. 114)

THE MAHANOY.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 225.

COLLISION ⇐96—BOAT LYING IN SLIP—TUG WITH TOW.

Evidence *held* to sustain the claim of libelant that respondent tug or her tow, which she was maneuvering into place in a slip, came into collision with libelant's canal boat, which was being discharged on a pier in the slip.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty for collision by Willis E. Benham against the steam tug Mahanoy; the Lehigh Valley Transportation Company, claimant. Decree for respondent, and libelant appeals. Reversed.

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (Anthony V. Lynch, Jr., of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. This appellant seeks to recover for damages sustained by the canal boat Sarah E. Thatcher while lying moored at the south side of the pier off Fifth street, Manhattan, East River. On December 30, 1916, the damage occurred. On that day, between 11 and 12 o'clock noon, the steam tug Mahanoy and her tow, the barge J. J. Humphrey, came into the slip. The barge was landed outside of some boats close by at the bulkhead. A question of fact is presented as to whether or not a collision occurred between this tow and the Thatcher. The District Judge, in an opinion delivered orally, dismissed the libel and stated:

"I am unable to reach a conclusion upon the preponderance of the evidence, and therefore hold that the libelant has not sustained the burden of proving damage by the fault of this tug."

We fully recognize the rule, often enunciated in this court, that the trial judge, in admiralty, has the advantage of seeing and hearing the witnesses, and that this appellate court is reluctant to disturb his conclusion on the facts. He has the opportunity of seeing and hearing the witnesses. The W. H. Flannery, 249 Fed. 349, 161 C. C. A. 357; The Beaver, 253 Fed. 312, 165 C. C. A. 94. But upon appeal, where this court may examine the weight of the evidence, we feel that upon this proof the libelant has borne the burden of proving damage as claim-

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ed. We feel obliged thus to examine the evidence, since the District Judge decided that he was unable to reach a conclusion upon a preponderance of the evidence. In his behalf the appellant called the stevedore who had charge of unloading the Thatcher, and who testified that between 11 a. m. and 12 noon, there was "an awful jar," which knocked him and his partner off their feet while they were stooping to make up a draft of lumber. After this, the witness went half way up the ladder and looked out of the side of the boat and saw the tug, which he identified as the Mahanoy, backing away. The blow appeared to the witness to come amidships, a point from which the Mahanoy was backing. There was damage to the planks at this point. An employé of the stevedore stated that "all of a sudden something crashed into the side of the boat and knocked him over into the other side." He, too, saw the Mahanoy backing away from the Thatcher. He stated there were no other boats moving alongside. The men on the Thatcher shouted to the Mahanoy.

Capt. Kerwin of the Mahanoy admits that they called to him. Another longshoreman, working on the deck, saw the tow coming in towing the canal boat and felt the bump. He was standing at amidships and the contact was forward of him. He did not know whether it was the tugboat or the coalboat which struck. Another employé of the stevedore, who was standing at amidships on the deck, saw the tugboat and saw the collision, but could not tell which of the two struck the Thatcher.

The appellant's wife testified that she looked out after the crash and saw the tug and her tow. She describes it as an "awful crash," and describes a second bump, which was not quite so bad as the first. She heard the man call out to the captain of the Mahanoy, and saw the Mahanoy's deckhand go on board the Thatcher to examine as to the damage. This deckhand admitted that there was damage to the side of the Thatcher. The appellant testified that he was not on the boat at the time of the collision, but came after, and saw a fresh break on the port side, about 25 or 30 feet from the bow.

Opposed to this testimony is that of Capt. Kerwin of the Mahanoy, who denied the collision, but who admitted that, when he started to back out of the slip, men on the Thatcher called to him to look at the damage he had done to her, and further that they showed him a broken plank about 10 feet back from the bow on the port side. His explanation of his maneuvers and backing the boat out is consistent with the claim of the appellant that a collision actually occurred. He said that, when his tug came into the slip, her bow was pointing slightly to the southward, with her stern to the northward, and stern a little up river. The Humphrey put her bow line on the starboard clip of the outside boat, which was a little aft of the blow. After loosening the stern line, he started to back before loosening the other lines, namely, the towing strap and towline. This required his backing up to get the strap off. He thus gave a swing of the Humphrey to land her alongside of the three moored barges.

Under these circumstances, the Humphrey could come in contact with the Thatcher. If the Humphrey's stern did not at first swing

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along the outside boat, it is fair to assume that there was something in the way, and this was probable, because the swing brought her into contact with the Mahanoy. The master of the Humphrey testified, as did Thompson, the Mahanoy's oiler, that there was "talk of an accident" outside on the tug.

We think that the testimony offered in behalf of the appellant was sufficiently strong evidence that a collision took place. The surrounding circumstances and the statements made by the appellee's witnesses in some measure corroborate the claim of the appellant. While it is true that there is denial of a collision, there is the fact that a collision was claimed at the time, and a man was immediately sent on board the Thatcher to make an examination of the damage. What caused the fresh break? It was proven that there were no other vessels in the vicinity at the time, or endeavoring to get in or out of the slip. There was the crash, severe enough to cause the workmen to lose their equilibrium. We must accept this as evidence which ordinarily should prevail over strictly negative evidence. Stitt v. Huidekoper, 84 U. S. (17 Wall.) 385, 21 L. Ed. 644. We are of the opinion that the appellant has sustained the burden upon him to prove the claim.

Decree reversed.

(258 Fed. 116)

CLYDE LIGHTERAGE CO. v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 224.

COLLISION ⟸71(3)—MOORED VESSELS—UNSAFE BERTH.

A barge moored by her master without making soundings in a slip, with her bow to a pier, and left with no one on board, lying over the edge of a sloping bank from which she slipped at low tide, breaking her lines, and coming into collision with another moored vessel, *held* in fault for the collision.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty for collision by the Clyde Lighterage Company against the Pennsylvania Railroad Company. Decree for respondent, and libelant appeals. Reversed.

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Frederick Pennell, both of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] On October 1, 1917, at 2 a. m., a collision occurred between the respondent's barge No. 420 and the libelant's steam lighter Henry C Rowe, which, at the time, was lying at the end of the pier of the American Linoleum Manufacturing Company at Linoleumville, Staten Island.

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The Rowe was tied from September 29, 1917, at about 5:30 p. m. until the time of the collision, at this mooring. The water was about 15 feet deep. She lay with her bow toward the south and her stern projecting beyond the north corner of the pier. On September 29th at about 7:45 p. m., the No. 420 was moored, bow in, stern out on the north side of the pier about 15 feet inside of the pier end. The master of the No. 420 says he made fast with a 4½-inch bow line in four parts, and a 4½-inch stern line in two parts. He did not touch his lines from the time he made fast until after the accident. At noon on Sunday September 30th he went home, returning at 7 a. m. Monday, after the accident.

At the time of the collision, apparently, there was no one on board the No. 420. She was moored at the edge of the shoal or bank, which sloped sharply into deep water near the pier end; at ebb tide she would take the ground. At the hour of collision, 2 a. m., the tide was ebb, and undoubtedly the No. 420 slipped off the bank or shoal, which consisted of a slippery blue clay, and, her lines not proving strong enough to hold her, she crashed into the stern of the Rowe, breaking the latter's side, upper deck guard, and rudder, and this gives rise to this action.

The District Judge classified the happening as an inevitable accident and found that there was no negligence proven and dismissed the libel. The collision, of course, was not due to an inevitable accident, and the respondent's advocate expressly disclaims any such contention. The Louisiana, 70 U. S. (3 Wall.) 164, 18 L. Ed. 85. The District Judge found that there was no serious dispute in regard to the actual facts. We think the proof justified the claim of the libelant that the respondent was negligent. The master of the No. 420, either without knowledge as to the bottom or without making soundings, moored his boat in an unsafe berth. The bottom, at 10 or 15 feet from the end of the pier, is described by the witnesses as a shoal with a slope something of about 5 or 8 degrees, and then from the shoal there is a perceptible drop down about 30 degrees more in a slimy blue clay. The District Judge found the barge laid over the edge of a ridge in which there was this sharp descent into the water. This is doubted, for it undoubtedly lay on the shoal and slipped off, causing the strain on the lines. The master testified that he did not know about this bottom and that he made no soundings to ascertain its condition. We think it was incumbent upon the master under the circumstances here disclosed, to have made an examination to ascertain the condition of the bottom. Daly v. N. Y. Dock Co., 254 Fed. 691, 166 C. C. A. 189. If the master knew of the condition of the bottom, it would have been negligence to have moored his vessel in this unsafe berth. Again, it appears that the No. 420 was not obliged to take this berth because of unloading, for she was not to discharge the cargo there, and, in discharging her cargo, would be obliged to take a berth further from the pier end. We think the principle enunciated in Campbell v. Penn. R. Co., 85 Fed. 462, 29 C. C. A. 268, is controlling as to the facts here involved. There a collision occurred between a car float and canal boats lying in the same slip. The court said:

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"They were bound, however, to exercise such care and prudence in securing her as the circumstances required and the circumstances in this case required a very high degree of care inasmuch as she had repeatedly grounded at low tide, they were chargeable with knowledge of the condition of the bottom, and, if they chose to leave her at that particular place without a watchman, were bound to secure her so that the list she might be expected to take, should there be an unusual fall of the tide, would successfully be overcome."

It is the negligence in berthing and securing the barge that constitutes the fault.

[2] It is claimed, on behalf of the appellee, that the lines were in good condition and practically new. There is a dispute as to this and as to the condition of the lines at the point where they parted. The lines were not produced, and inspection was therefore not afforded to ascertain whether they parted from strain or from being defective or insufficient. The failure to preserve the lines and produce them would justify the inference that, if produced, they would have shown the results of the strain due to the slipping of the barge as it came off the shoal. The Colon, 249 Fed. 462, 161 C. C. A. 418; The Bertha F. Walker, 220 Fed. 667, 136 C. C. A. 309.

The claim advanced by the appellee that the barge master, in leaving, was justified in relying upon the fact that the lines did not break at previous low tides, is without force. There were two low tides on Sunday. He was sleeping at the first low tide, and absent at the second low tide. But, assuming that he was not, the low tide was an occasion and opportunity for making known to him the condition of the bottom where he moored his boat. The successive shocks or blows upon the lines on the occasion of these low tides may well have worn and weakened the lines, which ultimately parted. The barge master did not look at the lines from the time of berthing his boat until after the accident. Where the issue is, as here, between the barge owner and the boat with which it has collided, failure to watch the lines may be negligent. Dailey v. Carroli, 248 Fed. 466, 160 C. C. A. 476.

We think the appellant established negligence on the part of the appellee's servants and was entitled to a decree.

Decree reversed.

(258 Fed. 118)

AMERICAN REALTY CO. v. CURRAN.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 208.

LOGS AND LOGGING ⇐8(1)—CONTRACT TO CUT WOOD—CONSTRUCTION.

A contract by plaintiff to cut as much wood as possible from certain lots of defendant, and deliver the same on the cars at a railroad station named, for a stated price per cord, defendant to furnish him provisions at cost during the work, *held* to require defendant to furnish the necessary cars.

In Error to the District Court of the United States for the District of Vermont.

Action by O. H. Curran against the American Realty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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Charles Batchelder, of Bethel, Vt., and Edward H. Edgerton, of Rochester, Vt., for plaintiff in error.

Alexander Dunnett, Charles A. Shields, and David S. Conant, all of St. Johnsbury, Vt., for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The defendant in error has recovered for breach of a contract dated June 5, 1917, wherein it was provided that the defendant in error cut and deliver on cars, in peeled and rough 4-foot wood at Rickers' Mills, Vt., as much wood as possible during the season of 1917–1918; further, that the phrase "as much wood as possible" would mean at least 1,500 cords. It was provided that the plaintiff in error furnish food to the defendant in error at cost price, plus the freight, and make advances in moneys from time to time "to enable the party of the first part to carry on his work."

On the day of shipment of each car, a notice stating the initial and number of each car and the contents, together with the original bill of lading, was to be mailed to the plaintiff in error at its office in Portland, Me. It was further provided that a scaler be appointed by the plaintiff in error, whose scale should be final, binding, and conclusive. Payments were to be made at the rate of $7 per cord for peeled wood and $6 for rough wood "delivered on the cars as above provided." The defendant in error entered upon the performance of this work and cut and piled 42.12 cords of peeled pulp wood and 1,889.06 cords of rough pulp. On the 31st of October, 1917, plaintiff in error notified the defendant in error to stop work, which he did, whereupon the plaintiff in error entered the camps of the defendant in error, took possession of the supplies and camp outfits, and gave credit to the defendant in error for $522.75. The defendant in error claims that, had he been permitted to work pursuant to the contract, he would have been able to cut approximately 6,000 cords of wood, and it is for this that he sued. The verdict of the jury awarded him $2,045.83. The recovery is for lost profit which the defendant in error would have earned, had he been permitted to carry out the terms of the contract.

Plaintiff in error claims that under the terms of the contract the duty of procuring cars upon which to load the wood rested on the defendant in error which, as stated by the plaintiff in error, "became important during the trial below, or whether the defendant in error could and would have been able to complete his undertaking, expressed in the contract, and cut and deliver on cars the whole of the 6,000 cords which defendant in error claimed was on the lots." The court charged the jury it was the duty of the plaintiff in error to furnish cars at reasonable times and in reasonable numbers to enable the plaintiff in error to load the wood. The direction to stop work is conclusively proven.

The only question presented by this appeal is whether the court fell into error in charging that it was the duty of the plaintiff in error to furnish the cars to be loaded. We think the court correctly instructed the jury. The contract is silent as to who was to furnish the cars for this work, but a contract of employment such as this must be construed in the light of the surrounding circumstances which confronted the

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contracting parties at the time. Regard must be had for what was usual and necessary in carrying on the business which was contracted to be performed. A construction should not be placed upon the contract which would give an unfair advantage to one party over the other, unless such was their manifest intention when the contract was made. Rock Island R. R. Co. v. Rio Grande, 143 U. S. 596, 12 Sup. Ct. 479, 36 L. Ed. 277.

Bearing in mind the basic rule, which requires the discovery of the intention of the parties so far as possible, or in finding the minds of the contractors and ascertaining the terms of their agreement, the court must view all of the surrounding circumstances and conditions at the time the contract was made. Leschen Rope Co. v. Mayflower, 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N. S.) 1. In the above reference to the contract, it will be seen that the defendant in error made an ordinary contract of employment, whereby he agreed to cut wood on certain lots of the plaintiff in error at a stipulated price per cord.

He was to be provisioned and paid at the price agreed upon. His duty was performed when he cut the wood and hauled and placed it upon the cars. He contracted no further obligation. The place of delivery upon the cars was fixed at Rickers' Mills, Vt., where he cut the wood.

The authorities relied upon by the defendant in error are not in conflict with these views. In O'Brien v. Wilkinson, 117 Wis. 468, 94 N. W. 337, it was expressly stipulated in the contract that the plaintiff had agreed to cut timber, and was to make delivery at a distant station. This required his transporting the lumber to that station, and the court held that from the terms of the contract there was an obligation to obtain the cars necessary to accomplish the result; that is, to make the delivery at the distant station.

In Godkin v. Monahan, 83 Fed. 116, 27 C. C. A. 410, Godkin agreed for a certain price to cut and deliver in the Wisconsin river all the Norway white pine timber suitable for sawlogs standing on a certain section, and these logs so cut were to be banked on the Twin river on or before a fixed date, and later to run into the Wisconsin river. The court held that Godkin was in duty bound to obtain a place on the Twin river on which to bank the logs. There the agreement with Godkin was that the logs should run into the Wisconsin river, and the bank on the Twin river was merely an incident to heading the logs to the Wisconsin river.

In the case of Meekins v. Newberry, 101 N. C. 17, 7 S. E. 655, the plaintiff agreed to raft logs sold to the defendant for towing by steamer, and to deliver them to the defendant when the latter sent a steamer or vessel to tow them. An offer was made by the plaintiff to introduce parol evidence that the defendant was to furnish him necessary rafting gear for properly rafting the logs, and to excuse his failure to raft the logs as per the written contract because of the failure of the defendant to supply the rafting gear. The court excluded this evidence as tending to vary the terms of the written contract. This authority does not aid the plaintiff in error.

The contract is a simple one of employment, and plaintiff in error breached it, apparently without cause. The District Judge very prop-

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erly submitted only the question of damages to the jury. There is no error in the clear instructions given to the jury, and we think the judgment should be affirmed.

(258 Fed. 121)

In re REILLY et al.

KNAPPENBURG v. ROWAN.

(Circuit Court of Appeals, Second Circuit. May 16, 1919.)

No. 74.

1. BANKRUPTCY ⟸440—REVIEW—PETITION TO REVISE.
Bankruptcy court's order requiring bidder to pay balance of purchase price for bankrupt's property is reviewable by petition to revise, under Bankruptcy Act, § 24 (Comp. St. § 9585), but not by appeal.

2. BANKRUPTCY ⟸440—PERFECTING APPEAL—DISMISSAL.
A bankruptcy court's order, improperly sought to be reviewed by appeal, instead of by a petition to revise, will be dismissed.

Appeal from the District Court of the United States for the Western District of New York.

In the matter of John H. Reilly and Thomas P. Reilly, individually and as copartners under the firm name and style of Reilly Bros., bankrupts. From an order requiring James A. Rowan to pay the balance of purchase price bid for the bankrupts' assets, Rowan appeals. Appeal dismissed.

An order in bankruptcy was made requiring appellant, a purchaser at a sale of the assets of the bankrupts, to pay the balance of the purchase price on the bid made by him for such assets. This appeal is from the order.

George A. King, of Dansville, N. Y., for appellant.

C. W. Knappenberg, of Dansville, N. Y., pro se.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Reilly Bros. were adjudicated bankrupts, and their assets, consisting, among other things, of card records, were sold by the trustee appointed in bankruptcy proceedings, at public auction. The appellant, James A. Rowan, was the highest bidder, and his bid was accepted. He refused to pay the balance of the purchase price. Thereupon the trustee obtained an order to show cause, returnable before the District Court on May 15, 1916, requiring him to show cause why he should not pay the balance of the purchase price, as he bid, for these card records. The card records comprised a mailing list of Reilly Bros. The reason for refusal of payment was the claim of breach of warranty made by the trustee at time of sale; it being claimed that the list did not contain the number of names as represented. It is claimed that the trustee represented, at the time of sale, a mailing list of some 67,000 names of retail and wholesale customers and also prospective customers of Reilly Bros., and which list had been valued by appraisers at $4,000. It is claimed that, of the list

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delivered by the trustee, there were but 35,393 names of customers and prospective customers of Reilly Bros., and that the balance, as delivered, were Boyd City Dispatch lists—lists of fruit syrup manufacturers. Reilly Bros. were engaged in the nursery stock business.

This controversy was submitted by the District Judge to the referee, to determine whether or not there were misrepresentations made. The referee has reported against the claim of the appellant, and his report has been confirmed by the District Judge. Rowan, feeling aggrieved, has appealed here.

[1] The practice followed in preparing and carrying on this appeal is contrary to the well-settled rules of this court. It is a proceeding in bankruptcy, and should have been brought to our attention by a petition to revise under Bankruptcy Act July 1, 1898, c. 541, § 24, 30 Stat. 545 (Comp. St. § 9585). Such practice was approved and is settled in this court. In re Franklin Brewing Co., 249 Fed. 333, 161 C. C. A. 341; In re Caponigri, 210 Fed. 897, 127 C. C. A. 466.

[2] We have uniformly held that where the aggrieved party does not proceed to bring his appeal to this court, according to the rules laid down by the court, we will not entertain such an appeal. In re Shidlovsky, 224 Fed. 450, 140 C. C. A. 654; Kirsner v. Taliaferro, 202 Fed. 51, 120 C. C. A. 305; In re Mertens, 142 Fed. 445, 73 C. C. A. 561.

Appeal dismissed.

(258 Fed. 122)

OTTO COKING CO., Inc., et al. v. KOPPERS CO.

(Circuit Court of Appeals, Third Circuit. May 22, 1919.)

No. 2435.

1. PATENTS ⟸51(1)—INVENTION—ANTICIPATION—RELATED ARTS.
Though two arts, producing the same products from the same source are concededly related, yet differences in them, if fundamental, may validly prevent inventions in one from operating as anticipations of inventions in the other.

2. PATENTS ⟸328—INVENTION—ANTICIPATION—"COKE" OVEN.
The Koppers patent, No. 818,033, for improvements in by-product coke ovens, *held* valid as to claims 1 and 5, and not anticipated by the Paris gas-retort furnaces, nor the Dods gas generator, patent No. 571,558; coke being the mass of carbon, which is left after the volatile matter of coal has been driven off by heat applied in such a manner as not to burn the carbon.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Metallurgical Coke.]

3. PATENTS ⟸240—INFRINGEMENT—IMPROVEMENTS.
Infringement of a patented device cannot be avoided by merely improving it.

4. PATENTS ⟸328—INFRINGEMENT—COKE OVEN.
The Koppers patent, No. 818,033, for improvements in by-product coke ovens, *held* infringed by devices built under patents Nos. 1,212,865 and 1,212,866, issued to Wilputte in 1917.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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5. PATENTS ⟸328—INFRINGEMENT.

Devices manufactured under the Koppers patent, No. 818,033, for improvements in by-product coke ovens, *held* not to infringe the Schniewind patent, No. 673,928, claim 1.

Appeal from the District Court of the United States for the District of Delaware; Charles P. Orr, District Judge, specially assigned.

Suit by the Koppers Company against the Otto Coking Company, Incorporated, and the Wilputte Coke Oven Corporation, with counterclaim by defendants. From a decree holding valid and infringed claims 1 and 5 of complainant's letters patent No. 818,033 issued April 17, 1906, to Heinrich Koppers for improvements in by-product coke ovens, and dismissing the counterclaim for infringement of defendant's letters patent No. 673,928, issued to Schniewind, defendants appeal. Affirmed.

Thomas F. Bayard, of Wilmington, Del. (Odin Roberts, of Boston, Mass., and Francis T. Chambers and John E. Hubbell, both of Philadelphia, Pa., of counsel), for appellants.

Henry Love Clarke, of Chicago, Ill., and Frederick P. Fish, of Boston, Mass., for appellee.

Before WOOLLEY and HAIGHT, Circuit Judges, and RELLSTAB, District Judge.

WOOLLEY, Circuit Judge. This appeal is from a decree of the District Court holding valid and infringed claims 1 and 5 of the complainant's Letters Patent, No. 818,033, issued April 17, 1906, to Heinrich Koppers, for improvements in by-product coke-ovens, and dismissing a counterclaim of infringement of defendant's Letters Patent, No. 673,928, issued to Schniewind.

The defenses pleaded respectively to the claim and counterclaim of infringement are: (1) Non-infringement; and (2) invalidity of the patent claims in suit, both for anticipation and lack of patentable invention.

Though the decision in this case will affect interests of considerable magnitude, the accompanying opinion probably will be read only by those who are engaged in the by-product coke-oven art and in kindred arts. As discussion in this opinion will be addressed to those who are conversant with the very extensive and complex subject matter of the patents in suit, we shall review the art, prior and present, in no greater detail than we deem necessary to make known the grounds of our decision.

The subject matter of the Koppers patent is by-product coke-ovens and the invention of the patent relates to improved means for heating them. The art of by-product coke-ovens was highly developed at the time of Koppers' invention. It was in itself a broad art. Because of its close relation, industrially and economically, to the great metallurgical arts, it had for many years attracted capital in ample measure and had invited the attention of scientists of the first order throughout the world. Notwithstanding the great advance which the art had

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made, the state of the art—that is, the point which the art had reached and at which it had stopped when Koppers made the invention of the patent in suit—disclosed a problem which was present at its beginning, which had persisted throughout its development, and which remained in a large measure unsolved. This was the problem of applying heat to the walls of a coking-chamber with an uniformity of temperature that would insure uniformity in the coking-operation and in the resultant products. Uniformity of heat distribution to coals in process of coking is essential to the production of coke of the structure and composition required for use in metallurgical industries as distinguished from coke suited only for general or domestic uses. Uniformity of heat distribution is essential also to the saving of those distilled by-products—such as benzol and toluol—that are peculiarly subject to destruction during distillation.

Koppers freely availed himself of the art and cleverly combined in his oven many features of merit which are not embraced in his invention. Therefore, in order correctly to estimate the issues of this case and properly to confine their decision to Koppers' invention, it will be necessary to distinguish in Koppers' oven the things which he invented from the things which already existed. This will require a short excursion into the prior art.

Coke is the mass of carbon which is left after the volatile matter of coal has been driven off by heat applied in such a manner as not to burn the carbon. Coking coals are converted into coke in the industrial arts in two principal ways, the gas-retort method and the coke-oven method.

The gas-retort method produces illuminating gas as a main product and yields as a by-product a soft, spongy and fragmentary coke known as "domestic coke." The coke-oven method produces a hard, strong and structurally coherent coke known as "metallurgical coke" because of its utility in foundry and blast furnace processes. In the production of coke of the latter grade, the gases of coal distillation may be altogether consumed as in the wasteful bee-hive coke-ovens, or they may be saved as highly valuable by-products as in by-product coke-ovens. The difference in coke products reflects the difference in methods of producing them and in the problems incident to their production. It is with by-product coke-ovens operated primarily to produce metallurgical coke, and secondarily, gaseous by-products, that we are concerned in this case.

The by-product coke-oven typical of the prior art, though appearing on its outside to be one huge, homogeneous structure, contained within itself two distinct organizations. One had to do with combustion and the other with supplying materials for combustion. These organizations, while inseparably related in their operation, occupied separate parts of the structure and were commonly referred to by reason of their location as the "upper story" and the "lower story" of the oven.

A by-product coke-oven of the prior art, while generally spoken of in the singular, comprised actually a plurality of ovens or coking-chambers, the size of the oven as a whole being determined by the numbe

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of coking-chambers desired. The upper story of the oven was made up of a battery of any number of long, high and narrow coking-chambers extending from side to side of the oven. Intermediate the coking-chambers and parallel with them was a like number of heating-chambers of somewhat similar dimensions. In this alternate arrangement of coking-chambers and heating-chambers, a wall of a heating-chamber was similarly a wall of its adjacent coking-chamber, and so on throughout the battery. Heat was conveyed from a heating-chamber, in which combustion occurred, through the wall dividing it from a coking-chamber to the coking-coals there undergoing distillation.

To facilitate uniformity of heat distribution to its walls, the heating-chamber was divided into many parts by narrow vertical flues extending from near the bottom of the chamber to a channel or flue running horizontally across its top. Nearly midway the heating-chamber, a partition, extending from the bottom upward to this horizontal flue, divided the chamber into two parts. These batteries of coking-chambers and heating-chambers, and certain hot air delivery flues presently to be mentioned, together with the supporting and separating masonry—all made of highly refractory and heat resisting bricks—comprised the combustion organization of the oven located in the upper story.

The lower story of the oven was largely made up of pillars and walls, likewise of refractory brick, to support the upper story. In the center of the lower story, or at its sides, or, indeed, on its outside, was placed one or more sets of regenerators. A "set" of regenerators comprised two regenerators. Between the regenerators and the sides of the oven, when the regenerators were placed in the center, or between the regenerators and the center of the oven, when the regenerators were placed at the sides, was a system of cooling-flues and open arches used to prevent melting or fluxing of the bottom masonry of the upper story, incident to the sub-bottom combustion system employed.

A regenerator, described very generally, is an oven-like structure of firebrick which contains at the bottom an air flue or sole-channel and checkerwork of firebrick upward from the sole-channel nearly to the dome. The functions of a regenerator are, primarily, to heat air, and secondarily, to so heat it that it attains an approach to uniformity of temperature before it is delivered to the heating-chambers of the second story, where it is used with gas as combustion material. Regenerators of the prior art—in coke-ovens as distinguished from gas generators—were placed longitudinal of the battery of heating-chambers, that is, at right angles to each heating-chamber and to each coking-chamber throughout the length or depth of the battery. This was the organization for supplying materials for combustion.

The connection between the two organizations, situate respectively in the upper and lower stories of the oven, was made by at least two flues leading from the regenerator to each heating-chamber, the first extending vertically to the second, and the second extending horizontally under the vertical flame-flues of each heating-chamber. The horizontal connecting flue was termed "bus-flue," and was in the very bot-

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tom of the upper story. It had as many air openings as there were vertical flame-flues. There were as many connections of this kind with the one longitudinal regenerator as there were heating-chambers to be served with preheated air.

In the operation of a regenerative coke-oven, unheated air was drawn by smokestack draft through the sole-channel into the body of the regenerator. It was there heated on its passage upward through a checkerwork of bricks, then conveyed from the regenerator to the bus-flues and thence to one side of the divided heating-chambers, where, in its travel, it mingled with inflowing gas and became ignited, thereby producing a gas jet for each flame-flue on that side of the division. Heat was in this way conveyed to the adjacent coking-chambers with some degree of uniformity. The hot, waste gases arising from combustion were then carried horizontally along the flues at the top of the heating-chambers, across the division, down through corresponding though inactive flame-flues in the other side of the heating-chambers, then into the bus-flues and thence on to the companion regenerator, where they served to reheat its checkerwork as they passed off into the outer air.

This operation was reversed at stated intervals, with the result that one regenerator of the set and one side of the connected heating-chambers were actively heating a corresponding part of the coking-chambers, lying intermediate the heating-chambers, while the other side of the heating-chambers and the other regenerator of the set were inactive except in being reheated for use when the operation was again reversed.

To understand Koppers' invention, it is necessary to have a better understanding of the prior art than can be had from this inadequate statement. Therefore, we insert at this point diagrams of Hoffman's coke-oven (U. S. No. 492,400—1893), an excellent illustration of the elements of the prior art in combination.

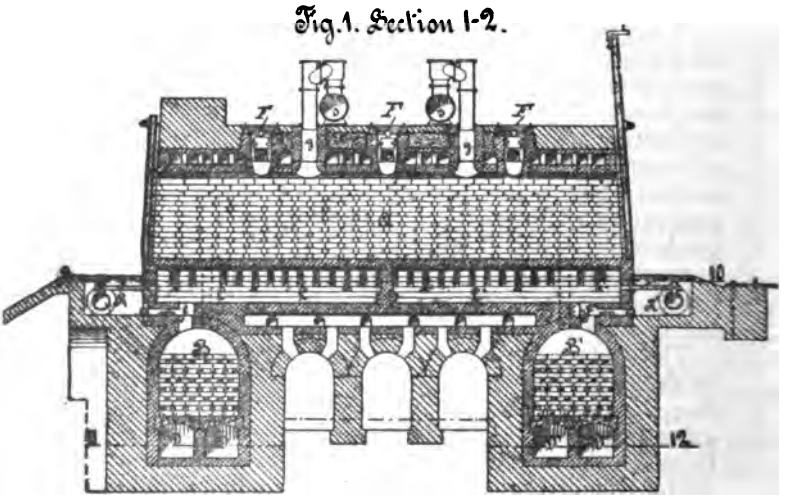

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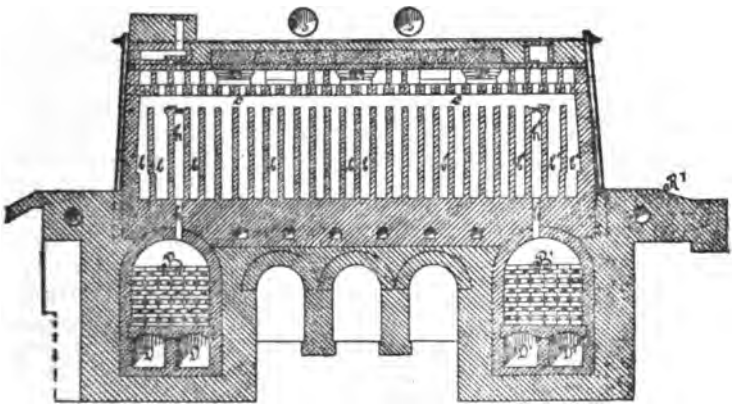
Fig. 2. Section 3-4.



An alternate arrangement of coking-chambers and heating-chambers in parallel alignment appears in Boult (British Patent No. 5,979—1883); Hoffman (U. S. Patent No. 492,400—1893); Otto (German Patent No. 88,200—1895); Hilgenstock (U. S. Patent No. 649,450—1900); Schniewind (U. S. Patent No. 673,928—1901); Koppers (U. S. Patent No. 738,918—1903). Vertical flame-flues are seen as early as Herberz (German Patent No. 25,526—1883) in which air and gas for combustion are introduced and ignited by means for regulating their supply. Flue combustion is found also in Koppers (British Patent No. 3,026—1899), in Hoffman (U. S. Patent No. 492,400—1893) and in many other patents. Regenerators in sets, each set ordinarily containing two, and positioned longitudinally the heating-chambers battery, each regenerator serving the whole battery and operated under the system of periodical reversal of air flow, are shown in the cited patents of Hoffman, Schniewind, Otto, and Herberz, and in the early Koppers.

Vertical connections from regenerator to horizontal bus-flues, and vertical connections thence to flame-flues of heating-chambers, for delivery of preheated air for combustion, appear in the same patents.

Koppers invented none of these elements of a by-product coke-oven; neither did he invent their method of operation. All were old in the art, yet all are found in one relation or another in the by-product coke-oven of his patent. As so much of the prior art is found in the organization of Koppers' coke-oven, what is there in his oven that distinguishes it from others in the art? What is the invention for which he was granted a patent?

Koppers has answered these questions by the claims of his patent in suit. They are as follows:

"1. In a coke-oven, a series of heating-chambers, and coking-chambers intermediate the heating-chambers, combined with a *series* of regenerators

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below and *parallel* to the heating-chambers and communicating *directly* therewith, substantially as specified."

"5. A coke-oven provided with coking-chambers, two sets of heating-chambers intermediate the coking-chambers, two sets of regenerators *communicating* with the heating-chambers and *arranged below the coking-chambers*, and a partition between the regenerators, substantially as specified."

Prior to Koppers' patent, the efforts of all inventors, including Koppers himself, to produce uniformity of heat intensity over the walls of heating-chambers of by-product, coke-ovens, were directed along the line of delivering and distributing preheated air to heating-chambers from a set of two regenerators which served the whole battery of heating-chambers, whatever the number, and which were positioned longitudinally the battery and at right angles to each heating-chamber. With heating-chambers crosswise the oven and regenerators lengthwise the oven and therefore at right angles to one another, the delivery of preheated air from regenerator to heating-chamber was necessarily roundabout or indirect. As the air, in its transit from regenerator to heating-chamber, traveled up the vertical flue and then along the horizontal channel or bus-flue to the flame-flues, it encountered inequality of air pressure in the flue, with consequent inequalities in air deliveries to the heating-chamber and in flame distribution over its walls.

This being the state of the art, how did Koppers meet its problems? He took what was good in the art and discarded what was bad. He retained the upper story combustion organization substantially as it was, but he departed abruptly from the prior art organization of the lower story. He abandoned the one set of regenerators which had served the whole battery of heating-chambers and provided in their stead a separate regenerator to serve each heating-chamber. In doing this, he greatly multiplied the number of regenerators and filled up the arched spaces which theretofore had been left open to keep the masonry below the bottom of the coking-chambers from fluxing, and in doing this he overcame the chief defect of the sub-bottom combustion system. He then changed the position of regenerators from longitudinal of the battery to crosswise the battery, placed each individual regenerator below and parallel to each heating-chamber and made multiple connections between the two which were vertical and direct instead of horizontal and indirect, thereby causing the preheated air to pass from each regenerator evenly and directly to its companion heating-chamber, where, on combustion, heat intensity is distributed over its walls with practical uniformity.

When Koppers made these changes, he wrought a change in the art from a stagnant struggle for uniform distribution of heat over heating-chamber walls to the achievement of that result. The change was immediately reflected in economy of operation and increase of production. Coke production for a given coking time was substantially doubled. The coke product was of the best metallurgical grade, and the saving of distilled by-products was increased, with a reduced waste of fuel gas used in the heating operation. The art promptly recognized these achievements and adopted Koppers' arrangement to

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the extent that over eighty per cent. of the by-product coke-ovens built during the last ten years in the United States have been Koppers ovens, amounting to 4,700 and representing an outlay of between $50,000,000 and $100,000,000. They exceed in number all competing ovens combined.

Koppers' changes from prior art ovens, involving changes in the number, size, and position of regenerators and in their relation to and connection with heating-chambers, may best be understood by comparing Koppers' patent diagrams here inserted with the diagrams of the Hoffman oven previously inserted.

Fig. 1

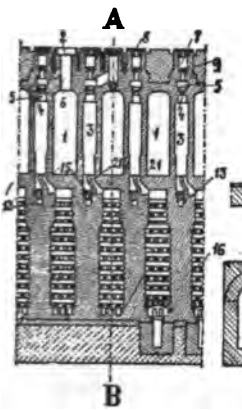


Fig. 2

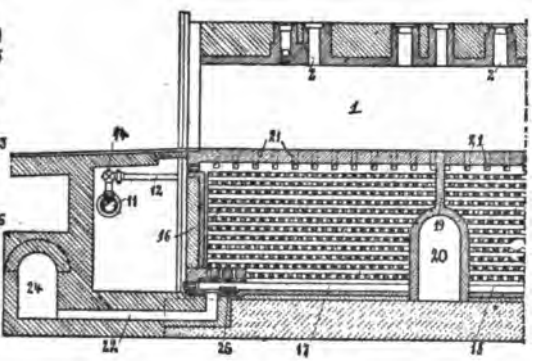


Fig. 3

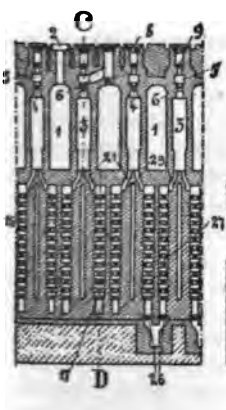
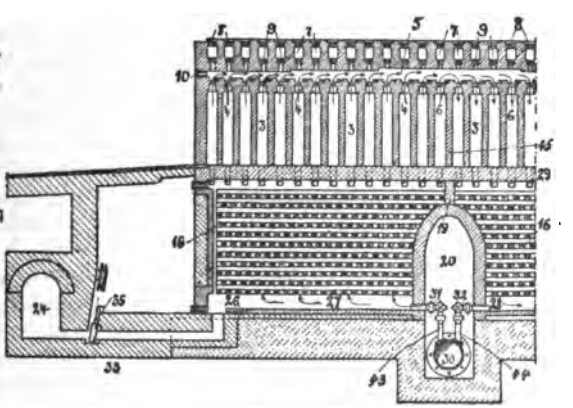


Fig. 4



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Measured by all standards, the things which Koppers did involved invention, if he was the first to do them.

But the defendants say, that in multiplying regenerators, in changing their position, and in connecting them directly with the heating-chambers, Koppers was not the first to do these things, citing as anticipations, first, the published report of the Fiftieth Congress of the Technical Society of the Gas Industry of France, held June 24, 1878, at Paris, on the subject of the Paris gas-retort furnaces; and, second, Dods U. S. Patent No. 571,558—1896, for a gas generator.

The fundamental difference between these references and the invention of the patent in suit—which we observe on the threshold and which we shall keep in mind throughout the discussion without burdening this opinion with repeated allusions to it—is the difference in the arts to which the references and the invention of the patent respectively belong. Paris gas-retort furnaces and the Dods gas generator belong to an art fairly described by their names, in which gas is the main product and coke the by-product. It may be termed the art of by-product gas-ovens. The invention of the patent belongs to an art in which coke is the main product and gas the by-product. This is the art of by-product coke-ovens.

[1] Though the two arts, producing the same products from the same source, are concededly related, yet differences in them, if fundamental, may validly prevent inventions in one from operating as anticipations of inventions in the other. While distillation of coal is practiced in both arts, and, therefore, coke-ovens or coking-chambers are included in the organization of both, difference in the process of distillation, in the function of the ovens, and in the products sought and obtained, mark the difference in the arts. The issue of invalidity of an invention in one art because of anticipation by inventions in another art, when the arts are different, though related, must be determined with a cautious regard to the differences that distinguish the two.

The Paris gas-retort contains coking-chambers, and regenerators, or recuperators, for preheating air. The coking-chambers are in the form of semi-cylindrical or tubular retorts, which lie horizontally across the furnace structure, each holding several hundred pounds of coal. These tubular coking-chambers are stacked in rows in what is substantially a flame-filled heating-chamber, in which flames are diffused throughout the chamber, above, below and around all parts of the coking-retorts. The system employed to preheat air for combustion is without reversal in the direction of flow and without alternate change of position of the flames. While coke is a product of the Paris gas-retort, it is incidental, the main object of the Paris gas-retort being the production of gas. In this furnace, there is nothing that requires uniformity of heat distribution, and therefore there is no means to perform that function. In a furnace of this type, the problems of a by-product coke-oven are not present, and, as we regard it, there is nothing in it to suggest the means which Koppers 28 years later employed to solve such problems.

The Dods gas generator (U. S. No. 571,558—1896) comprises com-

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bustion-chambers, heating-chambers, and regenerators. Heating-chambers and combustion-chambers are intermediate one another, as in coke-ovens, and regenerators (two in number) are placed below each heating-chamber. The prior art coke-oven system of reversing the flow of preheated air for combustion and of waste gases for reheating regenerators is used. On first view, Dods' organization seems to resemble rather closely the invention of Koppers. On examination, however, it is seen, that the coking-chambers of the Dods gas generator are tapered and in position are steeply inclined, the broader end of the tapered chamber being lower than the upper end; and that the intermediate heating-chambers are of similar dimensions and positions. These heating chambers are open in the sense of being without flame-flues to confine combustion to a particular direction or to control its distribution. As the furnace is a gas-retort, its primary product being gas, there is neither need nor means for the uniform distribution of heat.

[2] The pairs of regenerators under the heating-chamber are stepped one above the other and so are out of parallel with the inclined heating-chambers. Connections between regenerators and heating-chambers for the passage of preheated air are long and unequal conduits. This inequality of delivery conduits, we are told, makes uniform delivery of preheated air impossible. Gas is delivered to the heating-chamber by gas conduits of unequal length parallel with the air conduits, and combustion takes place on the meeting of gas and air in the open heating-chamber. These limitations, we are shown by the testimony, conflict with any practice of coke-oven distillation. As Dods' invention has never reached the industries—although it preceded Koppers by ten years—we do not know whether it is operative. We are inclined to believe, because of its lack of means for uniform heat distribution, that it will not produce metallurgical coke or those by-product gases which are destructively decomposed by overheating and are recovered only by uniform heating. We cannot believe that either the Paris gas-retort furnaces or the Dods gas generator did the things which Koppers did when he invented the coke-oven of his patent, or that they suggested to Koppers the conception which later he put into practice. Therefore, we agree with the learned trial judge, that the Paris gas-retort furnaces and the Dods gas generator do not anticipate Koppers' invention, and find with him that claims 1 and 5 of the Koppers patent in suit are valid.

We shall next direct our discussion to the issue of infringement of the Koppers patent in suit.

The defendants' alleged infringing by-product coke-ovens were built under patents to Wilputte (U. S. Nos. 1,212,865, 1,212,866—1917). Wilputte, like Koppers, made free use of what he found in the art—with this difference: He found Koppers there. Wilputte took the combustion organization of the upper story of the prior art by-product coke-oven and embodied it in his oven without change, except the elimination of the bus-flue. Koppers cannot complain of this, for he did the same thing. Wilputte's changes, like Koppers', were made in the organization of the lower story. Unless these changes were

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his conceptions, the question is: Where did Wilputte get them? From Koppers or from the prior art?

The elements of the Wilputte oven are elements of the prior art. Their organization, confessedly, is not the organization of the prior art. Then whose organization is it? The plaintiff admits that in certain structural details Wilputte differs from Koppers, but contends that, basically, it is the organization of the Koppers invention. The defendants admit similarity in certain structural essentials, but insist that the organization involves a fundamental difference—conceived by Wilputte—which makes infringement of Koppers impossible. In order to compare the Wilputte oven with Koppers' and to distinguish the two, on the issue of infringement, it is necessary to show the principal characteristics of the construction and operation of the Wilputte oven. An examination of diagrams of the last Wilputte patent, here inserted, will, on comparison with diagrams of the Koppers patent, previously inserted, be of assistance.

Externally and considered as a unit, the Wilputte oven is not distinguishable from Koppers. There is no infringement here, for in this respect Koppers is scarcely distinguishable from the prior art. Internally, and considered with reference to its duality of organization, the Wilputte oven is not different from Koppers. Here again there is no infringement, for in this Koppers copied the prior art. The combustion organization of Wilputte, located in the upper story of the oven, is the same as that of Koppers, but as Koppers took this organization from the prior art, it was equally free to Wilputte. The issue of infringement begins at the point where Koppers left the art and began to make changes. This is in the organization of the lower story

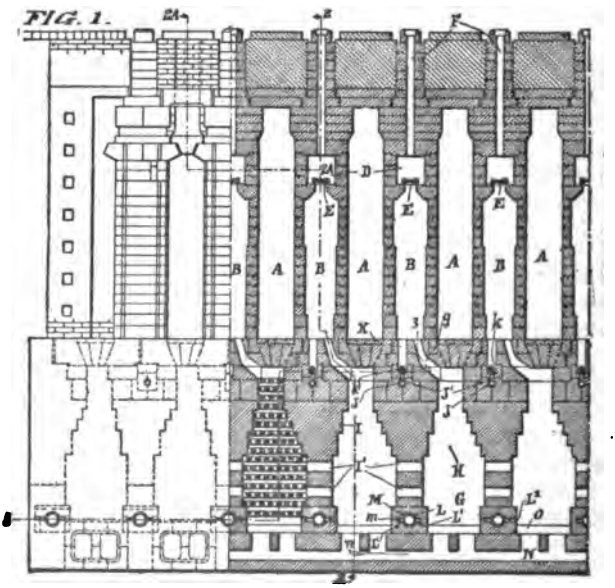

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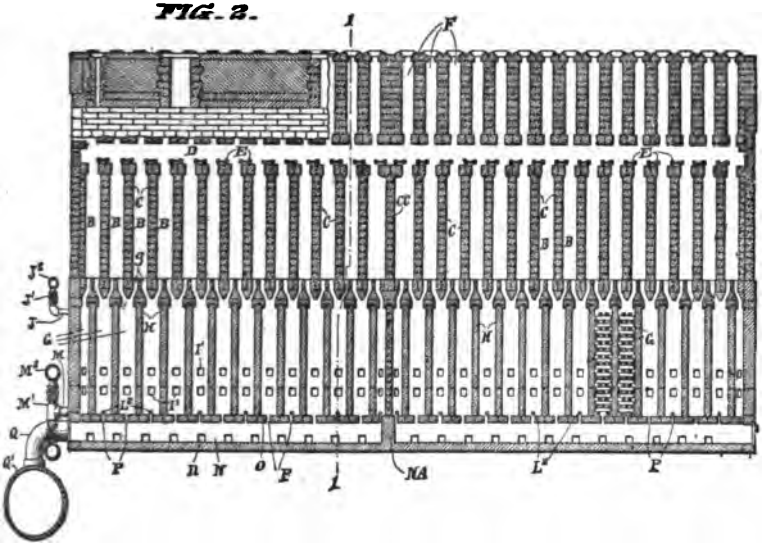
FIG. 2.



and in the connections between the organizations of the two stories of the oven. Wilputte's first change, like that of Koppers, was in the number of regenerators, the change being from a set of two to a number equal to the number of heating-chambers. His next change, like that of Koppers, was in the position of the regenerators from longitudinal of the oven to crosswise the oven and from right angles with the heating-chambers to a position below and parallel to them. Wilputte's last change, like Koppers', was from an indirect connection between the regenerator and bus-flue of each heating-chamber to a multiple direct connection between regenerator and heating-chamber.

Assuming this comparison of the two ovens to be correct so far as it goes, claims 1 and 5 of the Koppers patent read literally on the Wilputte structure. To avoid the legal consequence of such reading, Wilputte distinguishes his structure from Koppers by specifying a difference in the position of the regenerators with reference to the heating-chambers and by indicating a difference in the types of regenerators and in their mode of operation.

It is conceded by the plaintiff, that if the regenerators of the Wilputte oven are longitudinal of the oven, Willputte does not infringe Koppers. This, the defendants maintain, is the case. The first phase of the issue of infringement, therefore, is the position of the Wilputte regenerators.

Viewed as a regenerator extending crosswise the oven, the Wilputte regenerator is the Koppers regenerator substantially in size and dimensions and actually in its location below and parallel to the crosswise heating-chamber. The claimed difference is this: Koppers' regenerator is an unitary structure, while Wilputte's regenerator is divided into twenty-eight compartments by partitions extending from the sole-

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channel to the top. Again like Koppers, the Wilputte regenerators are made into a battery of any desired number, extending from the front to the back of the oven. In the battery of Koppers' regenerators, each regenerator is divided from its neighboring regenerator by the supporting walls of the oven. The same is true in Wilputte, with the difference that in the latter there are spaces left open in each supporting wall between all regenerators, the spaces being equal in area to that of two bricks. These spaces are termed "equalizing ports." As these wall-slits or equalizing ports appear in each supporting wall, they leave openings longitudinal of the entire oven. The defendants maintain, first, that the frontal splitting up of the (Koppers) cross-regenerator into multiple compartments makes the partition of each compartment the side of a smaller regenerator, and, second, that the sequence of wall-slits or equalizing ports, being longitudinal of the battery; gives the Wilputte compartmental regenerator a position longitudinal of the battery and not crosswise, and that, in consequence, the regenerator so shaped and positioned is in effect a reversion to the prior art and avoids infringing Koppers.

Elaborate argument was made on this contention. We shall not discuss it in this opinion, because we are satisfied that the inconsiderable openings in the supporting walls between the Wilputte compartmental regenerators do not make the position of the regenerators longitudinal; nor do they make them functionally longitudinal, because under normal conditions, when air is driven into each regenerator compartment by fans and drawn through the regenerator by smokestack draft, the equalizing ports have nothing to equalize and perform no function. Air thus driven and drawn naturally moves upward in each regenerator without stopping to pass laterally through the equalizing ports. In fact, the whole theory of difference between Wilputte and Koppers in mode of operation is based on the fact that into each regenerator compartment of the Wilputte oven a dose of air is fed precisely equal to the capacity of that compartment. This equality of dosage makes the equalizing ports functionless, under normal conditions.

The sole-channel is as certainly a part of a regenerator as the checkerwork of firebricks. The brick checkerwork cannot heat air until air is brought to it. It is the function of the sole-channel to bring unheated air to the regenerator and to feed it at multiple points to the checkerwork above, there to be heated. As the sole-channel is a part of a regenerator, the direction of the sole-channel is a fair indication of the position of a regenerator. The sole-channel of all regenerators of the prior art (also in Koppers) is lengthwise the regenerator, whatever the position of the regenerator with reference to heating-chambers; and so in Wilputte, the sole-channel, or its equivalent, is crosswise the oven and lengthwise the regenerator, passing under and serving unheated air to its many compartments.

For the reasons we have indicated, without elaborating them, we are clearly of opinion, that the Wilputte regenerators are not longitudinal of the battery, but are crosswise, and in this position they follow Koppers.

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[3] The next defence is, that, even if the Wilputte regenerator be a cross-regenerator in position, it is different from Koppers' regenerator in structure. This contention is based on the division of the regenerator into compartments. The division of whose regenerator? The division of the regenerator of the old by-product coke-oven art? No, because this art (as distinguished from the related art of gas generators) contained no such regenerator. The regenerator there found was a long regenerator, being longitudinal of the oven and serving all heating-chambers. Was it a division of Koppers' regenerator into compartments? Manifestly so, because Koppers' was the only regenerator of that shape and in that position then in the art. Therefore, the substance of what Wilputte did structurally with reference to his regenerator, was to take Koppers' regenerator and divide it by partitions into as many compartments as there were flame-flues in the heating-chamber above. This, Wilputte could not have done if Koppers or someone else had not invented the cross-regenerator. It follows then, that Wilputte built his regenerator on Koppers. In doing this, he took Koppers' regenerator as it was, both in structure and position, took nothing from it, and added something to it. Being an addition, he did not change its basic structure; the most that he did was to improve upon it. Infringement of a patent device cannot be avoided by merely improving it.

Wilputte's multiple connections between his compartmental regenerator and the flame-flues above, though limited to one for each regenerator compartment, are, taken together, so precisely the vertical and directly communicating air ports of the Koppers invention, that discussion of infringement of this feature is unnecessary. Therefore, considered with reference to the structure of the two ovens, we are forced to find that, basically, they are the same.

But the defendants maintain further, that even if the two ovens are alike in position and structure, the Wilputte multiple compartmental regenerator is fundamentally different from the Koppers unitary regenerator in its mode of operation, and that this difference is so substantial that the coking operation of the oven of the Koppers patent is not, and, indeed, cannot be followed in the Wilputte oven. This contention of difference in mode of operation of the two ovens is based upon a claimed difference in the operation of their regenerators. This contention requires us to discuss somewhat in detail the structure and function of regenerators in by-product coke-ovens.

A regenerator, defined without any attempt to be technical, is a firebrick chamber of a coke-oven used to heat air before it flows into the heating-chamber for combustion. It has three operative parts. The first is the sole-channel. This is a firebrick conduit, which brings unheated air from outdoors and carries it along the bottom of the chamber. The sole-channel contains in its top or roof a number of openings through which the unheated air passes into a checkerwork of firebrick—the second part—which is heated for weeks before the coking operation begins. As the air passes up through the checkerwork, two things happen: First, the air is heated, and second, any inequality in the volume of its initial delivery through the ports of the

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sole-channel are baffled into equality of temperature and volume as the air rises to the dome. The third part of the regenerator is the outlet through which the air after it has been heated passes to the heating-chamber. In the prior art regenerator, there was but one air outlet from regenerator to each heating-chamber. This was first vertical, then horizontal into the bus-flue, and then vertical again. There were in the bus-flue as many air outlets as there were vertical flame-flues to be served. Koppers' regenerator is structurally and operatively the regenerator of the prior art differentiated in number, shape and position to serve one instead of many heating-chambers, and differentiated chiefly in having not one but as many air outlets as there are vertical flame-flues to be served and in having these outlets vertical and leading directly to the flame-flues above.

Wilputte's compartmental regenerator contains precisely the same elements, but it is organized to operate in a different way. Instead of the sole-channel of the prior art as an inlet for unheated air, Wilputte has a 6-inch pipe with as many air outlets or orifices as there are compartments to be supplied with air, each outlet being graduated in size to meet the capacity of each compartment. In each compartment there is the old checkerwork of firebricks and from each compartment there is an air outlet leading directly to the flame-flue above. When the operation is reversed, the outflow of waste gases is taken care of by another channel, and, it seems to us, by the 6-inch air inlet pipe also. Be that as it may, we regard the pipe and the exit-channel together as the equivalent of the sole-channel of the prior art, for taken together they perform the same functions, even if they perform them better. The main difference in the regenerative function between Wilputte on the one hand and Koppers and the prior art on the other, is that in Wilputte's regenerator compartments there is no distribution or equalization of air by the baffling operation of the checkerwork beyond the confined area of a compartment, while in Koppers such distribution may extend throughout the regenerator. The problem of equal air distribution in Wilputte is wholly taken care of when the air is brought to the compartments. This is done by the initial injection into each compartment of a quantity of air precisely equal to the capacity of each compartment. This air allotment is termed "air dose." Air distribution from one compartment to another is impossible because of the intervening partitions. Air distribution among the many compartments is regulated by the air doses measured and delivered to each compartment. After delivery to a compartment, the air is heated as it ascends through the checkerwork as before, and after it has been heated it passes from the top of the compartment through a port directly to its corresponding flame-flue above.

It must be conceded, that in mode of operation, there is a difference between the contesting regenerators. On this difference, the defence of non-infringement must rest, for structurally, and, in all else, functionally, Wilputte has followed Koppers.

Notwithstanding the claims of the Koppers patent read literally on the Wilputte oven, the defendants maintain that the true invention of Koppers is not disclosed by the patent claims, but is found in the pat-

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ent specification, and particularly in the specification of his original application as it appeared before amendment. In the latter specification, Koppers said:

"It is the object of the present invention, by interposing the regenerator *in the path* of the hot gases, to render it possible to utilize said regenerator as *distributing means*. The invention is based upon the principle that the descending hot gases *become uniformly distributed over the regenerator* and that the ascending gases which are to be preliminarily heated also *undergo such distribution*. This parallel arrangement of heating flues and regenerators is attained by the transverse disposition of these latter, in such manner, that the combustible substances to be preliminarily heated are conducted to the part of the regenerator belonging to one-half of the furnace and *distributed* and burned throughout the length of the furnace, whereupon the burnt gases, descending through the other half of the regenerator reach the chimney."

A similar idea is contained in Koppers' description of his invention in his German patent. It is as follows:

"The leading idea of the present invention is this: so to introduce such a single-chamber air-heater (regenerator) *in the path of the hot gases*, air and off-heat that it acts simultaneously also *as a distributor*, and indeed in so far that while the descending hot gases *distribute themselves uniformly over the regenerator*, the ascending gases to be preheated, *likewise undergo such distribution*. This parallel arrangement of heating-flues and heat magazines (regenerators) is attained in this wise, that the latter are located transversely, that is, in the longitudinal direction of the individual ovens, in such manner, that the combustion substances (air and gas) to be preheated are introduced into the part of the regenerator belonging to one-half of the oven and are *distributed to the oven length*, then burned throughout the oven and finally descending as burnt gases through the other half of the regenerator, arrive at the exit-flue."

These expressions, touching the operation of the invention, do not appear in the patent in suit, but as they are Koppers' utterances they cannot be disregarded. From them, the defendants have construed Koppers' invention to be primarily, if not entirely, the *distribution* of air *by the checkerwork in the regenerator*, and thus construed his invention to be limited to distribution of that kind. If such is the invention, then, manifestly, Wilputte does not infringe, for he distributes air *in his regenerators* in a different way.

The only expression in the specification of the patent, as granted, which bears upon this aspect of the interpretation of the claims, is the following:

"The regenerators above described have the advantage that the passing gases are evenly distributed. As the regenerators are placed directly in the way of the heating-gases, the latter are also evenly distributed in the heating-chambers so that the formation of any whirls and stagnation is avoided."

On this and on the other specification expressions, the defendants' argument of regenerator-distribution as the essence of Koppers' invention is based. But as we read the specification of the patent and the specifications of Koppers' other patents for the same invention, we do not gather that air distribution *in the checkerwork* of the regenerator is the essence of the invention, or that air distribution *in the regenerator* is the whole invention, for manifestly the invention

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includes air distribution *to* the heating-chambers. Repeating the specification as quoted, Koppers says:

"The regenerators above described have the advantage that the passing gases *are evenly distributed.*"

"Evenly distributed"—in what? In the *regenerator,* to be sure, not in the checkerwork of any particular regenerator. Air distribution takes place in the regenerators of both ovens; in Koppers, by the sole-channel and main body of checkerwork; in Wilputte, by graduated sole-channel air deliveries to checkerwork of confined area. "Evenly distributed"—*to* what? Manifestly, to the *heating-chamber.* This is true, because the patent specification says so—"As the regenerators are placed directly in the way of the heating-gases (that is, directly in their "path"), the latter (heating-gases) are also evenly distributed *in the heating-chamber.*" It is also true because air is passed from regenerator to heating-chamber of both ovens, in a way that effects distribution *in its passage,* namely, by the distributing operation of multiple air ports.

Distribution of preheated air with uniformity *to the heating-chamber* is what Koppers tried to achieve by his invention. Distribution of air to this chamber involves, first, distribution *to* the regenerator; second, distribution *in* the regenerator; and, third, distribution *from* the regenerator. No matter how unheated air is distributed *to* a regenerator, or how it is distributed *in* a regenerator, it will not be distributed *from* the regenerator to the multiple flame-flues of the heating-chamber in uniform volume, there to produce on combustion uniformity in heat intensity, unless it is ported from the regenerator and distributed to the flame-flues uniformly. For such uniform distribution from regenerator to heating-chamber, Koppers provided multiple ports that distribute the air vertically and *directly.* This was the capital thing that Koppers did. It was wholly new. It was made possible only by the change in the number and position of regenerators, and it immediately overcame the factors of inequality of air distribution incident to the horizontal and indirect bus-flue delivery of the prior art. Air distribution by the baffle of the checkerwork of a cross-regenerator would be of no more value than similar distribution in a longitudinal regenerator, if not followed by multiple *direct* distribution from regenerator to heating-chamber. This the prior art clearly shows. And Wilputte's internal air distribution by graduated air feed would be of no value, if not combined with Koppers' multiple direct distribution to heating-chamber. If, instead of multiple air ports in the regenerators of Koppers and Wilputte, whose sole function is to distribute preheated air *to* the heating-chambers, there were in either regenerator a single air port, there would be a complete reversion to the prior art, and the infirmities of the bus-flue, now overcome, would be revived.

In his invention, Koppers uses the sole-channel and checkerwork of the prior art regenerator to perform the old functions of preheating and distributing air until it reaches the top of the regenerator, when the new thing occurs. This new thing is the direct and vertical de-

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livery to each flame-flue of regenerator-equalized air as distinguished from the old thing of a horizontal and indirect delivery of air similarly equalized. Wilputte does the same thing. He brings air to each compartment of his regenerator by the equivalent of a sole-channel, gives each compartment a precise dose, thus equalizing the quantity of air by sole-channel deliveries, then by the checkerwork heats just the air the dose contains. This much is new with Wilputte. But the new thing which Koppers invented then occurs in Wilputte, namely, multiple port distribution of air from the top of the cross-regenerator *vertically and directly* to its corresponding flame-flues above.

If Koppers' invention were a regenerator, then Wilputte clearly would not infringe. But Koppers' invention is not a regenerator; it is an organization of which a regenerator is only a part. This organization comprises the elements of coking-chamber, heating-chamber, regenerator, and connections, and in this organization, it is intended, that each element should perform its ordinary function. In his patent claims, Koppers covers simply a series of heating-chambers without specifying the type; a series of coking-chambers intermediate the heating-chambers, without specifying the type; combined with a series of regenerators, without specifying the type; but specifying very particularly that the regenerators shall be "below and parallel to the heating-chambers and communicating *directly* therewith." Invention is in this clause, for here it is that the change in regenerators is made from the longitudinal position of the prior art to the cross position of the patent and from indirect air distribution of the prior art to the direct air distribution of the patent. As Koppers did not invent a regenerator, Wilputte is free to use his improved regenerators in a coke-oven or to use the regenerators of the type Koppers adopted, if he does not place them crosswise the oven and parallel to the heating-chambers and does not connect them directly with the heating-chambers in the manner disclosed by Koppers' claims. But when Wilputte placed his compartmental regenerator crosswise the oven and made as many connections between it and its corresponding heating-chamber as there are compartments in one and flame-flues in the other, and made the connections vertical and direct, he did the things which Koppers taught. He placed the regenerators "directly in the way of the heating-gases" (as the specification says), obtained the normal "advantage" of regenerator "distribution" and also the new advantage of multiple port direct distribution to the heating-chambers, and got the air "evenly distributed in the heating-chambers."

[4] The heart of Koppers' invention is the number and position of regenerators in relation to heating-chambers and in the direct connections between the two. His invention does not consist in making a new kind of regenerator; it consists in placing a regenerator of whatever kind in a new position—that is, below and parallel to the heating-chambers—with new connections that will insure an uniformity of air deliveries. The regenerators of Koppers and Wilputte, even though differing in mode of operation, are none the less regenerators which perform broadly the function familiar to the art, that is, they receive unheated air, preheat it, and deliver it to the top of the re-

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generator at comparatively one temperature, thence to be distributed elsewhere. Variations in the method of regenerator distribution whether entirely in the sole-channel as in Wilputte, or partly in the sole-channel and partly in the checkerwork as in Koppers, do not make the chamber any the less a regenerator. Koppers dealt with regenerators. He dealt with their number and with their position in relation to the heating-chambers, and with their connection to the heating-chambers, not with a kind of regenerator. Given a regenerator, infringement occurs or is avoided, not according to the type of regenerator, but according to its position with reference to the heating-chamber and according to the connections between the two. When Wilputte placed his regenerators below and parallel to the heating-chambers, and made connections between the two which were multiple and direct, he got the air distribution of the Koppers invention, and in following him, we think, the defendants' infringed.

To the plaintiff's charge of infringement of the Koppers patent, the defendants interposed a counterclaim of infringement of claim 1 of U. S. Patent No. 673,928, granted to Schniewind, and later assigned to Otto Coking Company, Inc., one of the defendants. This issue of infringement has been elaborately developed and vigorously contested by the parties, and has been studiously followed by us. The charge of infringement is of a claim somewhat limited by specific references to the patent drawings, and is based on a very careful comparison of the elements of the two inventions. On the surface, these elements are markedly dissimilar, yet are claimed to be in all respects identical or equivalent. We shall do nothing more in disposing of this issue than make a very brief comparison of the two ovens.

[5] Schniewind has a pair of regenerators built entirely independent of the oven structure, to avoid the effect of their expansion on the oven brickwork. Being longitudinal of the oven, the two regenerators serve a battery of any number of heating-chambers. Koppers' regenerators correspond in number with the heating-chambers. They are built entirely within the oven structure, and, like the heating-chambers are positioned crosswise the oven, where each regenerator serves a separate heating-chamber. In Schniewind, connection between regenerator and heating-chamber is by one flue which is vertical, then by a connecting flue which is horizontal, running crosswise the heating-chamber like the bus-flue of the prior art, as against Koppers' multiple-vertical-direct flue connection. In Schniewind combustion takes place in a number of horizontally extending combustion-chambers, which are without divisions at the bottom and are divided into four vertical flame-flues toward the top. In Koppers, there are no such chambers, and combustion takes place in the flame-flues themselves. In Schniewind, gas is ported to the combustion-chambers where it meets the air from the horizontal air flue and ignites into a flame that extends first over the undivided portion of the horizontally extending combustion-chambers and then is carried into the vertical flame-flues. In Koppers, the air meets gas in the direct flame-flue ports and on ignition the flame is carried directly into the flame-flues and nowhere else. These, we believe to be the substantial differences

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between the two ovens. Instead of regarding them as differences, the defendants argue that they are in substance the same things. We have not been persuaded to this conclusion. As we are clear that Schniewind, being earlier, does not anticipate Koppers, it follows that Koppers does not infringe Schniewind.

The decree below is affirmed.

(258 Fed. 141)

IDEAL NOVELTY & TOY CO. v. MAJESTIC DOLL CO., Inc.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 219.

PATENTS ⇐328—INFRINGEMENT—DOLL HEAD.

The Rommer patent, No. 1,149,858, for a doll head having movable eyes, the novel feature of which is a spring clip for holding the eyes, which renders them readily removable for replacement, *held* not infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Ideal Novelty & Toy Company against the Majestic Doll Company, Incorporated. Decree for defendant, and complainant appeals. Affirmed.

Action is on all claims of patent 1,149,858, granted August 10, 1915 to Isaac A. Rommer. The first claim is as follows:

"1. A doll head having eye apertures, sockets adjacent the eye apertures formed in the wall of the head, an eyeball provided with ears, a weight upon the eyeball, *a spring clip having end sections bent outwardly* and adapted to engage the said ears and to rest in the said sockets substantially as shown and described."

Every claim contains the words above italicized.

The court below dismissed the bill, holding that no infringement was shown. Plaintiff appeals.

Andrew Foulds, Jr., of New York City, for appellant.

T. Hart Anderson, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. The stated object of invention is "to provide a doll head with movable eyes, in which the eyes may be readily removed and replaced." The doll referred to is of the kind that shows eyes open when stood or held upright, and closed or "asleep" when prone.

There is nothing new disclosed or claimed except the mode of fastening the eyes to the head. To effect this purpose the "spring clip" of the claims is shown as a hairpin of wire with outwardly bent ends, each end passing through a hole in an "ear" of the piece of metal painted to simulate an eye, and thence into a socket appropriately made in the head.

Plainly, by compressing and releasing such hairpin spring, the "outwardly bent end sections" thereof can be inserted in and detached

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from the head sockets as often as desired, and the eye supported thereby "readily removed and replaced."

While nothing is said on the subject in the specification, it is testified that this construction has advantages when applied to doll heads made of a composition that shrinks in hardening, and continues so to shrink long after most dolls have passed into use. Assuming this to be true, it shows utility only, and that the invention possesses the patent quantum of that commodity is not denied.

Defendant supports "sleeping eyes" in doll heads on a straight wire, said to be part of a wire nail of appropriate diameter. Infringement is asserted because this is declared a fair equivalent for Rommer's "spring clip," etc., because defendant's wire possesses sufficient resiliency to bend on insertion or removal, so that the same result is attained in the same way.

We agree with the lower court that such is not the case, because: (1) The evidence justifies the finding that if defendant's wire is inserted by bending it, instead of distending and then compressing the still plastic head, the wire must be and remain straight to permit the supported eyes to function properly. No alleged infringement shown or testified to shows a straight wire which can fairly be called a "spring," and the spring is the essence of plaintiff's invention. (2) By no permissible stretch of language can a straight piece of steel be described as a "spring clip having end sections bent outwardly," and every claim of Rommer's patent contains this carefully specified and restrictive element.

Therefore, looking at the matter as broadly as so narrow a subject permits, we feel sure that defendant has not even reached the same result as plaintiff, for his eyes are not removable and replaceable at will and without injury or tools, nor has he attained any result in the same way. His wire is ductile, but is not a spring; while as matter of law we hold that the claims are so drawn as not to read on defendant's doll eye. This negatives infringement. Tostevin v. Ettinger, 254 Fed. 434, 166 C. C. A. 66.

Decree affirmed, with costs.

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(258 Fed. 161)

FARRELL v. EDWARD RUTLEDGE TIMBER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 3276.

1. PUBLIC LANDS ⟸106(1)—LIEU LANDS—LAND OFFICE FINDINGS.
A land office decision, sustaining a lieu land selection upon authority of its previous decision that unsurveyed lieu lands listed by railway companies were designated with reasonable certainty by descriptions applicable to them after they should have been surveyed, *held* not a finding of fact that lands were described with reasonable certainty.

2. PUBLIC LANDS ⟸82—LIEU LAND SELECTION—SUFFICIENCY OF DESCRIPTION.
Designation of railroad lieu lands by description which would apply to them after they should have been surveyed *held* not to describe them with a reasonable degree of certainty as required by Act March 2, 1899, when applied to land separated by 7½ miles of rough, mountainous, and timbered country from a known survey.

Appeal from the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by Beldon M. Delany, for whom Alra G. Farrell was substituted, against the Edward Rutledge Timber Company, and the Northern Pacific Railway Company. Decree for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Beldon M. Delany brought a suit in the court below to have the Edward Rutledge Timber Company, a corporation, declared a trustee for him of the legal title to a quarter section of land of which he claimed to be the equitable owner by virtue of settlement and subsequent entry and final proof under the homestead laws of the United States. The facts as found by the court below are that on July 5, 1901, the Governor of the state of Idaho applied to the Surveyor General of the state, and to the Commissioner of the General Land Office, under the Act of August 18, 1894 (28 Stat. 394, c. 301), for a survey of a township of unsurveyed lands, including the land in controversy. On July 15, 1901, the application was filed in the office of the Commissioner of the General Land Office. Thereafter the state complied with the requirements of the act and obtained title to some of the lands covered by its application, but not the lands involved in this suit.

On July 23, 1901, under the Act of March 2, 1899 (30 Stat. 993, c. 377), the Northern Pacific Railway Company filed its lieu selection list in the local land office at Cœur d'Alene, Idaho. On or about May 1, 1902, W. B. Leach, a citizen of the requisite age and qualified to make homestead entry, having no knowledge of the application of the state or of the filing of the lieu selection list by the railway company, settled upon a portion of the vacant, unoccupied public domain of the United States which was afterwards by the official survey found to be the northeast quarter of section 20, township 43 north, range 4 E. B. M., and he continuously resided and made his home thereon until June 21, 1903, when he sold his claim and improvements to Delany, who was also a citizen and competent to acquire land under the homestead laws. Delany established his home on the land, with the intention of entering the same under the homestead laws of the United States when open for entry, and he improved and cultivated the land and continuously made his home thereon until after the commencement of this suit. On June 4, 1909, the land was surveyed and opened to settlement.

On June 10, 1909, Delany made his application to enter the quarter section on which he resided under the homestead laws, and on November 20, 1912, he offered final proof. His homestead entry was rejected on the ground that it was in conflict with selection by the state of Idaho. From that decision he appealed to the Commissioner of the General Land Office, and on December

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16, 1909, the commissioner sustained the decision of the local land office, and ruled that the right of the state was prior, and that Delany's application was properly rejected on that ground. On June 28, 1915, the claims of the state of Idaho were canceled, and on July 9, 1915, Delany's homestead application was held for rejection on the ground that it was in conflict with the selections of the railway company. Delany appealed to the Secretary of the Interior, and on November 18, 1915, the Secretary affirmed the decision of the General Land Office on the ground that the railway company had the right to make a valid application for the land notwithstanding the claim of the state of Idaho. Patent was issued to the railway company, and the land was thereafter conveyed to Edward Rutledge Timber Company. It was shown that when Leach made his settlement on the land he blazed a line around his claim to locate his boundaries, and posted notices on each corner, and that, when he sold out to Delany, the latter took down Leach's notices and posted notices of his own. Delany did not know that an attempt had been made to appropriate the land, either by the state or by the railway company, and there was nothing on the land or in the local land office to indicate that any such claim was made, except the lieu selection list which was on file and the application of the state, which was a matter of record in the General Land Office.

On June 21, 1903, when Delany purchased the rights of Leach and made settlement on the land, the nearest surveyed line to the said land was the east line of township 43, range 2 E. B. M., 7½ miles distant from the nearest part of said land. The land between those two lines was very rough and mountainous, and the most of it covered with heavy timber. Section 4 of the Act of March 2, 1899, providing for lieu land selections, declares: "In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity." In the list which was filed the railway company described the land as follows: "The following tract which when surveyed will be described as follows: All of 20—43—4, containing 640 acres."

A. H. Kenyon, of Spokane, Wash., and S. M. Stockslager, of Washington, D. C., for appellant.

Stiles W. Burr, of St. Paul, Minn., Jno. J. Skuse and Fred B. Morrill, both of Spokane, Wash., and Horace H. Glenn, of St. Paul, Minn., for appellees.

Before GILBERT and MORROW, Circuit Judges, and DOOLING, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The appellant contends that the land was not described in the railway company's list so as to designate the same with a reasonable degree of certainty. The appellees contend (1) that the lands were designated with a reasonable degree of certainty, and (2) that the acceptance of the list and the issuance of patent by the Land Office involved the finding of fact that the lands were designated with a reasonable degree of certainty, and that such a finding of fact is conclusive.

[1] We find in this case no decision of fact that the description of the land as listed by the railway company designated the same with a reasonable degree of certainty. The record shows, on the contrary, that no decision was made on the facts of the case, and that the action

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of the Land Office was but the application of the settled rule of practice which it followed in all cases, that all unsurveyed lands listed by a railway company as lieu lands are designated with a reasonable degree of certainty if they are designated by the description applicable to them after they shall have been surveyed. Thus on the appeal the decision of the Secretary of the Interior states, not that the rejection of Delany's application was supported by the facts, but that it was supported by the reasons given by the department in its decision in Daniels v. Northern Pac. Ry. Co., 43 Land Dec. 381. Turning to that decision, we find it stating that all lists filed for lieu lands by railway companies were accepted under general regulations of the department in every case where the lands were described in the terms of future survey, and the decision points to the Act of Congress of July 1, 1898 (30 Stat. 620, c. 546), which provided that lands under that act be selected in terms of a future survey, as sanctioning the propriety of the settled practice of the Land Department.

Conceding that the act of 1898 had the meaning attributed to it, it is to be observed that a year later, in enacting the statute under which the lieu lands were selected in the present case, Congress adopted a different provision and required, not that the lands be described in terms of future survey, but that they be designated with a reasonable degree of certainty, which, as we take it, means that Congress was not satisfied that the prior statute and prior practice were adequate in every case for the description of listed lands, but that other means of identification might become necessary in view of possible facts which would render the description in terms of future survey inadequate. In the present case, it is clear that the particular circumstances attending this lieu land selection were not taken into consideration by the Land Department. They did not decide that the description was reasonably sufficient, as applied to this particular tract of land. They applied only a rule of practice, and in so doing decided a question of law and not a question of fact.

A similar case was before us. West v. Edward Rutledge Timber Co., 221 Fed. 30, 136 C. C. A. 556, in which we sustained the court below in ruling that the railway company's designation of a list of unsurveyed land by the description by which it would be known when surveyed was legally sufficient, where the tract was within three miles of a surveyed township and could be located with approximate certainty. In that case we said:

"It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal subdivisions in the fastnesses of the Cascades or Rocky Mountain ranges, far distant from any government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the statute. What may be a sufficient description for designating the tract under one set of circumstances might be wholly insufficient under another."

Our decision was affirmed in West v. Rutledge Timber Co., 244 U. S. 90, 37 Sup. Ct. 587, 61 L. Ed. 1010. In that case the court said:

"What was a description having 'a reasonable degree of certainty' was to be determined by the circumstances. It was in the nature of a question of fact and had tests for decision, as the Court of Appeals pointed out."

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This means that the question is in the nature of a question of fact when it is determinable according to the proper tests applicable to facts. It does not mean that the adoption and application of a general rule of practice by the Land Office is a decision of a question of fact.

[2] We are of the opinion that to designate the section of land in which the section in controversy is situated in terms of a future survey was wholly insufficient to designate the same with a reasonable degree of certainty. In the West Case, this court said:

"But the farther they remove from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, until eventually no reasonable being could expect another to tie back to a known surety for the purpose of identification."

With the uncertainty there foreshadowed we are here brought face to face. The homestead settler here could not, without the expenditure of a large sum of money, ascertain in what section his land would be when finally surveyed. The land was 7½ miles from a known survey, and the intervening space was a rough, mountainous, timbered country. Even if he had gone to the expense of a survey, he could not know that the government survey would coincide with his. By the Act of May 14, 1880, c. 89, 21 Stat. 141 (Comp. St. §§ 4536–4538), he was given the right to make his homestead upon unsurveyed lands. He duly marked the boundaries of his claim, and made his residence thereon. He selected a parcel of land in an unsurveyed township, with nothing on the ground or on record in the plats of the local land office to notify him that the tract had been selected by the railway company. Said the court in Lytle v. State of Arkansas, 9 How. 314, 333 (13 L. Ed. 153):

"The adventurous pioneer, who is found in advance of our settlements, encounters many hardships, and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years."

And in Ard v. Brandon, 156 U. S. 537, 543, 15 Sup. Ct. 406, 409 (39 L. Ed. 524), the court said:

"The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon."

The view which we have taken of this branch of the case renders it unnecessary to consider the other assignments of error.

The decree is reversed, and the cause is remanded to the court below, with instructions to enter a decree for the appellant as prayed for in the bill.

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(258 Fed. 165)

SOUTHERN PAC. CO. v. STEVENS et al.

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 3269.

1. APPEAL AND ERROR ⟸1053(3)—HARMLESS ERROR—EVIDENCE—CURE BY INSTRUCTION.

Where a complaint alleged that a certain agent of defendant carrier agreed to furnish plaintiff live stock cars, any error in admitting a conversation regarding agreement by another agent is cured by instruction that recovery must be based on contract made with agent named in complaint.

2. EVIDENCE ⟸355(1)—STATEMENT OF FREIGHT RATES—FAILURE TO FURNISH CARS.

In action to recover for failure to furnish live stock cars, a written statement of freight rates delivered to plaintiffs by defendant's agent and prepared by clerk in agent's office is admissible, although not actually prepared by agent himself.

3. EVIDENCE ⟸357—TRIAL ⟸85—FAILURE TO FURNISH LIVE STOCK CARS—LETTERS AND TELEGRAMS—SPECIFIC OBJECTION.

In action for failure to furnish live stock cars, plaintiffs' telegrams and letter to defendant demanding cars and threatening to hold it liable for damages, etc., *held* admissible, and objection should have been specifically made to any self-serving portions thereof.

4. CARRIERS ⟸47(1)—AGENT'S AUTHORITY—CHIEF CLERK.

A chief clerk in manifest bureau of defendant railroad, with whom plaintiffs claimed to have contracted regarding the furnishing of live stock cars, *held* apparently authorized to represent defendant.

5. CARRIERS ⟸69(5)—CONTRACT TO FURNISH CARS—AGENT'S AUTHORITY—JURY QUESTION.

Evidence that chief clerk in manifest bureau of defendant railroad acted as the traffic manager's assistant in agreeing to furnish plaintiffs live stock cars for shipment originating on a connecting road, etc., *held* to make his authority to bind defendant a jury question.

6. APPEAL AND ERROR ⟸928(2)—RESERVING GROUNDS FOR REVIEW—REQUESTED INSTRUCTIONS.

Refusing requested instructions is not reversible error, where no exception was taken to general charge, since it will be presumed that charge which was given properly presented all questions.

In Error to the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Action by W. Samuel Stevens and Emmet C. Stevens, copartners doing business under the firm name and style of the Stevens Cotton Company, against the Southern Pacific Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

The defendants in error obtained judgment against the plaintiff in error for $5,236.04 damages for failure to furnish cars under a contract to transport 362 head of dairy stock from Mt. Vernon, Wash., to Phœnix and Gila, Ariz. The parties will be named plaintiffs and defendant as in the court below.

There was evidence that the plaintiffs' agents applied to one Gatter, the agent of the defendant at Phœnix, for information as to their contemplated shipment. Gatter referred them to Luce, the general freight and passenger agent of the defendant at San Francisco. They applied at the office of Luce, and the chief clerk on learning their business told them that Frye had that business in charge. They discussed the details of the shipment with Frye, and

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they testified that he told them that the defendant would handle the shipment promptly and furnish the cars; that it was not necessary to wire his office when ready to ship, but to notify the local agent of the Great Northern Railroad Company at Mt. Vernon, giving him four or five days' notice; and the plaintiffs were given a quotation of a rate from Mt. Vernon to Phœnix and Gila, Ariz. The plaintiffs then purchased the dairy stock, in the vicinity of Mt. Vernon, and on November 26, 1916, ordered the cars from the local agent of the Great Northern Railway Company at Mt. Vernon, Wash. That agent transmitted the order to the defendant, and on December 1st he received the information from the defendant that it could not furnish the stock cars "as yet," but would try to get some as soon as possible, and on the following day the defendant sent word that it was unable to furnish any cars at all. The plaintiffs made efforts to get the cattle shipped, but without avail, and finally shipped them by express to Stockton, Cal., and thence by freight by the Santa Fé to Phœnix. For the enhanced expense of shipping the cattle, and injury to the cattle caused by the delay, owing to storms and inadequate feeding facilities at Mt. Vernon, damages were awarded by the jury.

Francis M. Hartman, of Tucson, Ariz., and J. C. Forest, of Phœnix, Ariz. (Guy V. Shoup and Elmer Westlake, both of San Francisco, Cal., of counsel), for plaintiff in error.

Thomas Armstrong, Jr., Ernest W. Lewis, and R. Wm. Kramer, all of Phœnix, Ariz., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] Error is assigned to the admission of evidence of a conversation which the plaintiffs' agents had with Gatter, in which the latter said that the defendant would handle the stock out of Mt. Vernon and give every facility therefor. This was objected to on the ground that the complaint had alleged that the contract was made with Frye at San Francisco. The testimony was admitted as preliminary to the conversation with Frye, and, if there was error in its admission, it was cured by the court's instruction to the jury that the plaintiffs could not recover on the basis of any contract made with Gatter.

[2] Error is assigned to the admission of a written statement of freight rates furnished the plaintiffs' agents at San Francisco, the ground of the objection having been that it was not prepared by Frye. It is a sufficient answer to this to say that the statement was furnished at the request of the plaintiffs' agents and was prepared by a clerk in Frye's office at his direction and was delivered by Frye.

[3] It is contended that it was error to admit in evidence certain exhibits to which objection was made, on the ground that they were self-serving, incompetent, immaterial, and irrelevant. The exhibits consisted of, first, two identical telegrams sent by the plaintiffs on December 5, 1916, one to Luce, the other to Hinshaw, general agent of the defendant at Portland, Or., stating that, after the negotiations regarding stock cars, the plaintiffs had purchased nearly 400 head of cattle, which they were then holding under heavy expense, and that they were damaged by delay, and adding:

"Have made strong demands through local office for cars immediate shipment and now appeal to you direct. Shall hold Southern Pacific responsible for all feed, expenses, deaths, damages suffered through delay. Answer."

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It was proper for the plaintiffs to show that they were making every effort to obtain cars from the defendant and were advising them of the importance of having the cars on hand. If there were any self-serving statements in the dispatch, objection should have been directed specifically to these portions thereof, not to the whole body of the dispatch. The same may be said in regard to the dispatch of December 6, 1916, sent by the plaintiffs to Hinshaw, and the letter of December 5, 1916, sent to Luce. In the letter the writer said:

"Have made strong demands through local office for cars immediate shipment, and now appeal to you direct. * * * I will certainly appreciate all immediate efforts possible to stop this tremendous cost to your company and myself. * * * I feel sure that you will appreciate my position in this matter and make every effort to satisfy my losses and facilitate the shipment without further delay."

It is to be observed that the agents of the defendant made no denial of the statements contained in these communications, and apparently accepted the same as stating the truth of the situation. On December 5, 1916, Hinshaw answered the plaintiffs' dispatch to him saying:

"Southern Pacific appreciates your situation and will do everything possible assist, but cannot guarantee furnish cars. Will wire Gatter what can accomplish, but meantime suggest wiring your representative Mt. Vernon continue his efforts. Have Great Northern supply cars."

Before the plaintiffs could render the defendant liable for the additional cost of shipping the cattle by express, it was necessary for them to exhaust every remedy and make every effort to obtain the promised cars. The dispatches and the letters are evidence that they fulfilled that obligation. We are not convinced that the admission of the exhibits was error for which the judgment should be reversed.

[4, 5] Error is assigned to the denial of the defendant's motion for an instructed verdict in its favor. It is urged that the motion should have been sustained for want of proof of Frye's authority to make a contract for the defendant. Frye was the head clerk in the manifest bureau, and in the office of the general freight agent of the road he dealt with the plaintiffs and furnished them quotations of freight rates and, according to their testimony, entered into the contract. He was apparently clothed with authority to represent the defendant in making a contract, and the plaintiffs had the right to rely on his assumption of such authority. 10 C. J. 216, and cases there cited; Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 462, 25 Sup. Ct. 84, 49 L. Ed. 269; Aerne v. Gostlow, 60 Or. 113, 118 Pac. 277; Brace v. Northern Pac. R. Co., 63 Wash. 417, 115 Pac. 841, 38 L. R. A. (N. S.) 1135. But the principal question here involved is whether there was evidence sufficient to go to the jury to show that Frye in addition to the ordinary authority of an agent had authority to make this particular contract; the general rule being that the principal is not bound by the contract of a local agent for transportation over a connecting line in the absence of express authority or a course of business from which such authority may be inferred. The cattle were to be carried from Mt. Vernon on the line of the Great Northern to Portland, a distance of 252 miles, and thence on the defendant's line a distance of

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about 2,000 miles to points in Arizona. That they were to be carried through without unloading at Portland is shown by Frye's letter to Hinshaw of November 21, 1916, which was written in the name of Luce, "Freight Traffic Manager." There is little evidence on the subject of Frye's authority to make a contract to furnish cars at a point on a connecting road. There is evidence in the case, however, which seems to indicate that such was the course of business of the defendant, and that such was the understanding, not only of Frye, but of the agents of the defendant at Phœnix, Portland, and Seattle. Frye gave the plaintiff a statement of rates, evidently estimated as for the service of the defendant's cars, from Mt. Vernon to Gila and Phœnix, and Frye, on cross-examination, testified:

"If the agent at Mt. Vernon should want Southern Pacific cars, he would make out an application to his superintendent for these cars, and the Great Northern would transmit that order to the Southern Pacific Company, and, if the Southern Pacific Company had the cars that they could furnish, I have no doubt but that they would let the cars go up on the Great Northern."

We think sufficient appears to warrant the jury in finding that Frye was pursuing a customary and authorized course of business in entering into, if he did enter into, the contract which was alleged in the complaint. And here the contract was not made by a local agent of the defendant. Frye in making it acted as assistant to Luce, the general traffic manager of the defendant. In Northern Pacific Ry. Co. v. Amer. Trading Co., 195 U. S. 439, 462, 25 Sup. Ct. 84, 91 (49 L. Ed. 269), it was said:

"A railroad company has the power, as we have seen, to make such a contract of carriage beyond its lines. A general agent would be presumed to have such power."

See, also, White v. Mo. Pac. Ry. Co., 19 Mo. App. 400; Bigelow v. Chicago, Burlington & N. R. Co., 104 Wis. 109, 80 N. W. 95.

We find no error in the denial of the motion for an instructed verdict.

[6] Error is assigned to the refusal of certain instructions requested by the defendant. The bill of exceptions recites that no exception was taken to the general charge. The general charge is not incorporated in the record. In such a case, it will be presumed that the charge which was given properly presented to the jury all questions involved in the case, and error cannot be predicated upon the refusal of requested instructions. Johnston v. United States, 154 Fed. 445, 83 C. C. A. 299; Northern Pac. Ry. Co. v. Tynan, 119 Fed. 288, 56 C. C. A. 192; Columbia Mfg. Co. v. Hastings, 121 Fed. 328, 57 C. C. A. 504; Union Mut. Life Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193.

The judgment is affirmed.

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(258 Fed. 169)

CINCINNATI TRACTION CO. v. COLE et al.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1919.)

No. 3186.

1. FRAUDS, STATUTE OF ⟸18(2)—PROMISE TO ANSWER FOR DEBT OR DEFAULT OF ANOTHER.
The statute of frauds (Gen. Code Ohio, § 8621), relating to promises to answer for the debt or default of another, does not apply to a promise for a consideration made to the debtor to pay his debt.

2. FRAUDS, STATUTE OF ⟸34—PROMISE TO ANSWER FOR DEBT OF THIRD PERSON—FUNDS IN PROMISOR'S HANDS.
As the first section of the original statute of frauds provides that no action shall be brought to charge any executor or administrator upon any special promise to answer damages on his own estate, etc., the second section, appearing as Gen. Code Ohio, § 8621, and declaring that no action shall be maintained on a promise to answer for the debt or default of another, unless in writing, etc., does not apply to a promise to answer for the debt of a third person out of such person's funds in the promisor's hands.

3. FRAUDS, STATUTE OF ⟸33(1)—PROMISE TO ANSWER FOR DEBT OR DEFAULT OF ANOTHER.
Notwithstanding the statute of frauds (Gen. Code Ohio, § 8621), declaring that no action shall be brought on a promise to answer for the debt, default, or miscarriage of another, unless the agreement is in writing, etc., an oral promise to answer for the debt or default of another is enforceable, where the leading object of the promisor was, not to answer for the debt of another, but to subserve some pecuniary or business purpose of his own.

4. FRAUDS, STATUTE OF ⟸34—AGREEMENT TO ANSWER FOR DEBT OR DEFAULT OF ANOTHER—POSSESSION OF FUNDS OF DEBTOR.
Where a contractor had nearly completed extensive work for defendant, and defendant had retained a large sum already earned, *held*, that a promise by defendant to pay a lumber company the amount which the contractor owed, by which means the company was induced to furnish more lumber and failed to perfect its lien, though oral, is enforceable, despite the statute of frauds (Gen. Code Ohio, § 8621); it being not only a promise for the benefit of defendant, but a promise to pay the debt out of funds of the contractor.

5. CORPORATIONS ⟸433(1)—OFFICERS—AUTHORITY.
Where an officer of defendant, known as comptroller, whose duty had to do with its auditing and treasury departments, and who at times acted as treasurer and at others as vice president, made a special promise to pay plaintiffs, who were furnishing lumber to a contractor doing work for the defendant, such officer cannot be held, as a matter of law, without authority.

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action by James O. Cole and others, as executors of Clinton Crane, partners as C. Crane & Co., against the Cincinnati Traction Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Joseph Wilby, of Cincinnati, Ohio, for plaintiff in error.
Charles H. Stephens, Jr., of Cincinnati, Ohio, for defendants in error.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. The positions in the lower court of the parties to this writ were the reverse of what they are here. The trial was by jury, and the principal error assigned is the overruling of defendant's motion for a directed verdict. The motion was not made until after the court's charge to the jury. The right to make it that late is challenged; but, as we hold that the motion was properly overruled, it is not necessary to determine this question. It may be noted, however, that the situation would have been different had the court refused to hear the motion.

[1, 2] The motion was based upon two grounds. One was that the promise, the basis of the action, was one to answer for the debt of another, and, not being in writing or evidenced thereby, was void under the Ohio statute of frauds (section 8621, General Code of Ohio), which is in the usual form of such statutes. We proceed to consider this ground before stating the other.

The promise was claimed to have been made on or about November 9, 1909. If made at all, the conditions under which it was made were these: The Heffron Construction Company had then nearly completed a contract with defendant, made March 30th, previously, by which it was to do certain work on its premises for $15,561.75, of which $9,548.78 had been paid, upon monthly estimates, to an assignee of the Heffron Company, and possibly as much as $2,000 more had been earned, the larger part of which was retained percentage. That company was indebted to plaintiffs in the sum of $2,949.20 for lumber used in that work. Plaintiffs had a right to take out a lien on defendant's premises therefor, which would be unaffected by the assignment or payments thereunder. Section 8334, General Code of Ohio. The defendant, by its contract, had the right to retain out of subsequent payments an amount sufficient to indemnify it against this lien, and, in case of deficiency, had recourse against the Heffron Company and a surety company to make it good.

Plaintiff's evidence tended to show that the making of the promise came about by their refusal to deliver more lumber needed to complete the contract, that it was made in consideration of their promise to continue delivering and not to take out a lien, and that it was to pay plaintiffs, at least conditionally (i. e., if the Heffron Company did not), both for the lumber previously delivered and that thereafter delivered. Thereafter plaintiff delivered lumber which came to $524.71, making the whole amount due them $3,474.06, for the recovery of which the action was brought.

Defendant denied having made such a promise; but it is undisputed that in January, 1910, after plaintiffs had finished delivering, defendant, by letter, absolutely assured them that they would be paid, and their evidence tended to show that they were not advised that it would

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not comply with its assurance until it was too late to take out a lien. According to what plaintiff's evidence tended to show, there was a sufficient consideration to uphold defendant's promise. It is not claimed that there was not. It is questioned whether plaintiff's promise, which constituted the consideration thereof, covered the not taking out of a lien. As to this we do not deem it necessary to say more than that we think that plaintiff's evidence justified the conclusion that it did. But the promise to continue to deliver lumber was sufficient of itself to uphold the promise in its entirety, for the plaintiffs were under no obligation to the Heffron Company so to do.

The plaintiff in error bases its contention that the promise sued on was within the statute and hence void, solely upon the fact that, so far as plaintiff's evidence tended to establish the making thereof, it was only a conditional promise; i. e., a promise to pay if the Heffron Company did not. If this did not bring it within the statute, it does not contend that it was within it. The charge of the lower court to the jury presupposed that it was a question for them whether such was the character of the promise. They were told that, if such was its character, there could be no recovery, and that they could find for plaintiffs only in case they determined that the promise was an absolute one; i. e., "to pay—not if the Heffron Company did not pay, but pay anyhow." They were further charged that the written assurance was not sufficient to take the promise out of the statute, for two reasons, to wit, want of authority on the part of the officer of defendant, who had given it, to give it, and the necessity of parol evidence to explain a reference in the letter from plaintiffs, to which it was an answer.

The position of plaintiff in error, that the only promise which plaintiff's evidence tended to establish was a conditional promise, is difficult to combat. The sole witness thereto testified, on cross-examination, that the "precise language" used was, "we will pay this account if Heffron Construction Company does not," and that the language was in substance, "We will see that this account is paid if the Heffron Construction Company does not pay it." His testimony on direct examination is not inconsistent with such having been the language used, and all other pertinent evidence, apart, perhaps, from the absolute assurance referred to, tended to make out a conditional promise; and we will dispose of the case on the assumption that such was the character of the promise. The plaintiff in error is now so cocksure that, this being so, the promise was within the statute and it was entitled to a directed verdict, that we eliminate every other consideration bearing on its being so entitled on this ground, in order that we may meet it where it has chosen to rest its case. Possibly it was not always of this view, i. e., not until after the lower court had charged that, if such was the character of the promise, there could be no recovery. This may account for its not having requested the peremptory instruction until after the jury had been charged.

The plaintiff in error's contention amounts to this: that every conditional promise to pay the debt of a third person is within the statute. Is this so? To answer this question it is necessary to interpret the statute. A statute may be viewed as a symbol. A symbol has

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been defined to be "a soul in a body." Rather, perhaps, it should be put that it is a body with a soul. Its phraseology is its body, and its thought is its soul. Sometimes the thought of a statute and its phraseology do not coincide. Where such is the case, it is its thought, and not its phraseology, which is the statute. The sole description of what is covered by the statute here is "a special promise to answer for the debt, default, or miscarriage of another person." We take it that it is the thought of the statute that it is only a conditional promise to pay the debt of a third person—i. e., to pay it if he does not—that is covered by the statute; for it is only such a promise that is a promise to answer for the debt of another within its meaning. It follows that an absolute promise to pay a debt of a third person is not within the statute. Gibbs v. Blanchard, 15 Mich. 292; National Bank v. State Bank, 93 Iowa, 650, 61 N. W. 1065, 57 Am. St. Rep. 284; Lakeman v. Mount Stephen, L. R. 7 Eng. & Ir. App. 17.

In Wald's Pollock on Contracts (3d Ed. by Williston) p. 170, it is said:

"A promise to be primarily liable, or to be liable at all events, whether any third person is or shall become liable or not, is not within the statute, and need not be in writing."

But it does not follow that, because a conditional promise only is within the statute, every such promise is within it, or, to go back to the phraseology of the statute, that because a promise to answer for the debt of another person only is within the statute that every promise to do so is within it. Whether every such promise is within it depends on its thought; for, as stated, the thought of the statute, and it alone, is the statute. A close observation of its phraseology takes note of the fact that it says nothing whatever as to the person to whom the promise is made. Seemingly, therefore, a promise of the character called for, made to any person, is within it. But, indisputably, such is not the case. Amongst the differences as to what is within the statute there is none here. In the case of Eastwood v. Kenyon, 11 A. & E. 438, it was held that a promise for a sufficient consideration made to the debtor to pay his debt is not within the statute. Lord Denman said:

"The statute applies only to promises made to the person to whom another is answerable."

Wald's Pollock on Contracts (3d Ed. by Williston) p. 170, puts it that a promise is not within the statute "unless it is made to the principal creditor."

The case of Eastwood v. Kenyon, decided in 1840, is the first case in which this question seems to have arisen. The position was not argued out. It was taken per saltum. The only possible ground upon which it can be based is that a promise which is not made to the person to whom the third person is answerable—i. e., to the creditor—is not within the thought of the statute. That such a promise is not within its thought suggests that possibly there may be other promises to answer for the debt of a third person which are not within its thought, and hence not covered by the statute. And so we find. The clause of the statute of frauds involved here is the second clause of the orig-

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inal statute of Charles II. The first clause thereof provides that no action shall be brought "whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate." These two clauses are found in juxtaposition in the same section of the Ohio statute, but in the reverse order. This first clause expressly limits the promise covered by it to a promise to answer out of the promisor's own estate. This suggests that it is the thought of the second clause that the promise covered by it is a promise to answer out of the promisor's own estate, and that therefore it does not cover a promise to answer out of the debtor's estate which may be in the promisor's hands. It is so held, and as to this, too, there is no difference of opinion. Throop on Verbal Agreements, § 13, says:

"And there is a class of cases under the second clause, not appearing to depend upon its wording, which bears a very close resemblance with respect to the principle which governs them, and the facts calling for its application to a corresponding class under the first clause. We refer to those where the promise to pay the debt of another is held to be good without writing, because the promisor held a fund proceeding from the debtor and applicable to the fulfillment of the promise, in contemplation of which the promise was made. The similarity in the situation of the promisor under such circumstances, and that of an executor or administrator having sufficient assets to pay the debt of the decedent, and who, in consideration thereof verbally undertakes to pay it, is very striking. And the principle upon which each description of promises has been held to be without the statute is substantially the same. For while the first clause expressly provides that it shall be applicable only to a promise by the executor or administrator to answer damages out of his own estate, the second manifestly has the same meaning with respect to a liability incurred by one person to answer for the debt, default, or miscarriage of another."

The authorities are numerous to the effect that a promise to answer for the debt of a third person out of such person's funds, in the promisor's hands, is not within the statute. We cite only the authoritative case of Estabrook v. Gebhart, 32 Ohio St. 415. The third paragraph of the syllabus, which gives the law of the case, is in these words:

"E. contracts with S. to build a house, and S. contracts with G. to furnish labor and materials. G. refuses to furnish such labor and materials except upon a promise, made to him by E., that he himself will pay the bill out of the funds coming to S. Held to be a contract not within the statute of frauds, so as to make a writing necessary."

The Supreme Court said:

"The first part of the charge relates to the nature of the alleged promise made by Estabrook. The court told the jury plainly that, if this promise was merely to answer for Showalter's debt, there could be no recovery for want of writing; but if there was a new contract between Gebhart and Estabrook, by which, to induce Gebhart to furnish the labor and material, Estabrook undertook to pay, out of the funds which would be coming to Showalter, that Gebhart furnished the * * * material relying on this promise, which he would not otherwise have done, and that Showalter was irresponsible and assented to this arrangement, then the contract might be enforced."

[3] But this does not exhaust all the possibilities of a promise to answer for the debt of another, not being within the thought of the statute, and hence not within it. We have already noted that the stat-

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ute says nothing whatever as to the person to whom the promise is made. It is equally silent as to the person by whom it is made. Seemingly, therefore, a promise of the character called for, made by any person, is within the statute. But is this so? Our observation of the statute has brought to our attention that its phraseology is indefinite in three particulars, to wit, as to the person to whom it is made, as to the estate out of which the promisor is to answer for the debt, and as to the person by whom the promise is made. We have found that, though the statute is indefinite in phraseology in the first two particulars, it is definite in its thought as to each of them. In view of this, one would naturally expect it to be definite, also, in thought in the third particular, thus making it definite in thought all around. And the means of making it is at hand, just as it is at hand in the other two particulars. In the first particular, it consists in the radical difference between the creditor and any other person; and in the second, in such difference between the promisor's own estate and that of the debtor. So in the third particular it consists in the radical difference between a promisor who has no personal concern in the debt of the third person, and one who has such concern therein. Possibly, if one is duly sympathetic, he will sense that it is the thought of the statute that it is a promise made by a person who has no personal concern in the debt, and none other, which is covered by it, just as it was sensed that it was its thought that it was a promise made to the creditor, and none other, which is so covered. And it seems fitting that, if it is only a promise made to the creditor to answer for the debt out of the promisor's own estate that is within the thought of the statute, that it is only such a promise made by one who has no personal concern in the debt that is within its thought. Why should one who has no personal concern in the debt and one who has be placed on the same footing? The object in view in the enactment of the original statute of frauds is thus stated therein:

"For the prevention of many fraudulent practices which are commonly endeavored to be held by perjury and subornation of perjuries."

The interest prompting a Legislature to protect from perjury is not the same in the case of one who has a personal concern in the debt as in that of one who has no such concern therein. Where the promisor has a personal concern in the debt, the making of the promise is not dependent solely on the testimony of witnesses. The fact of having such concern is a corroborating circumstance in support of testimony tending to show the making of the promise. It renders its making more likely.

These circumstances tend to lead one to take the position, independent of authority, that it is only a promise made by one who has no personal concern in the debt that is within the thought of the statute and hence within the statute itself. When we come to tradition, we find numerous decisions, some of which are authoritative as to us, in which the promise involved has been held not to be covered by the statute, which can be, and which, in our judgment, should be, placed on this ground. The personal concern of the promisor in the debt may be either in its creation or in its payment. It is in its creation, if it is

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made before or at the time of the creation of the debt. It is in its payment, if made after the creation thereof. The decisions which are authoritative as to us were in cases where the personal concern of the promisor was in the creation of the debt. They are Emerson v. Slater, 22 How. 28, 16 L. Ed. 360; Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826; Crawford v. Edison, 45 Ohio St. 239, 13 N. E. 80.

The first paragraph of the syllabus in Crawford v. Edison is in these words:

"When the leading object of the promisor is, not to answer for another, but to subserve some pecuniary or business purpose of his own, involving a benefit to himself, or damage to the contracting party, his promise is not within the statute of frauds, although it may be in form a promise to pay the debt of another, and its performance may incidentally have the effect of extinguishing that liability."

There Crawford, the promisor, contracted with Smith to build him a house. Smith subcontracted with Edison to do some work on the house. After Edison had done about two-thirds of his work, Smith abandoned the job and left the country, without having paid Edison anything. Edison claimed that he then refused to do any more work unless Crawford promised to pay him, and, upon Crawford's so promising him, he completed his work. It was held that, if such was the case, Edison was entitled to recover of Crawford the entire amount of his debt. At the time of the promise Crawford had a personal concern in Edison's finishing his work and the creation of the debt for that portion thereof. Otherwise the house would remain uncompleted. It is true that the evidence on behalf of Edison tended strongly to establish an absolute promise on Crawford's part, and it was left to the jury, as here, to determine whether the promise was absolute or conditional, they being told that if it was conditional there could be no recovery. This of itself was sufficient to sustain the judgment of the lower court on the verdict for plaintiff.

But the court did not base its affirmance on this ground, but on that set forth in the first syllabus. It is there said that, though in form a promise to pay the debt of another, yet if the leading object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, it is not within the statute. This statement of the law is taken substantially from the opinion of Mr. Justice Clifford in Emerson v. Slater. The promise sued on in that case was made to one who had contracted with a railroad company to build its railroad by one interested in the company as stockholder and creditor, and was to pay promisee a certain sum if he would finish the railroad by a certain day. The promise was treated as one to answer for the debt of the company to the extent of the sum. The personal concern of the promisor was in the creation of the debt. Its creation would result from the finishing of the railroad. Thereby the railroad would be put in condition for operation, and by its operation the promisor would obtain payment of his debt and dividends on his stock. It was held that the promise was not within the statute. Mr. Justice Clifford thus stated the ground of the decision:

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"Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

The case of Davis v. Patrick is substantially the same as that of Emerson v. Slater. The promise sued on there was made to one who had contracted with a mining company for the transportation of ore by one interested in the company as creditor, and was to see the promisee paid. Though the promisor was to see him paid for transportation of ore under his contract, both theretofore and thereafter, the suit was only for subsequent transportation; the previous transportation having been paid for by the company. Mr. Justice Brewer said:

"Whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate, and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise."

And, again:

"The thought is that there is a marked difference between a promise which, without any interest in the subject-matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor. The case before us is in the latter category. While the original promisor was the mining company, and the undertaking was for its benefit, yet the performance of the contract inured equally to the benefit of Davis and the mining company. Performance helped the mining company in the payment of its debt to Davis, and at the same time helped Davis to secure the payment of the mining company's debt to him."

We know no authoritative case where the promise was made after the creation of the debt and the personal concern of the promisor was in its payment. But numerous cases of this character can be cited, the decision in which that the promise was not within the statute can and should be placed on the ground that, as the promisor had personal concern in the payment of the debt the promise was not within the thought of the statute. We cite but two, to wit, the early case of Williams v. Leper, 3 Burrow, 1886, and that of Landis v. Royer, 59 Pa. 95.

The promise sued on in Williams v. Leper was made to a landlord, who was about to distrain the goods of the tenant for arrears of rent, by one to whom the tenant had conveyed his goods for the benefit of his creditors. That sued on in Landis v. Royer was made to a mate-

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rialman, who supplied lumber to a contractor in erecting a house for the promisor, and who had a right to take out a mechanic's lien on the building. Judge Sharswood said:

"It was the debt of the defendant's own building, the payment of which could legally be enforced against it; though it may not have been personally his debt, his property was answerable for it, and his engagement to pay was in relief of his property."

Judge Campbell, in the course of his opinion in Corkins v. Collins, 16 Mich. 478, thus put the matter:

"When, by the release of the property from a lien, the party promising to pay the debt is enabled to apply it to his own benefit, so that the release inures to his own advantage, it is quite easy to see that a promise to pay the debt in order to obtain the release may be properly regarded as made on his own behalf, and not on behalf of the original debtor, and any possible advantage to the latter is merely incidental, and is not the thing bargained for. That promise is therefore in no proper sense a promise to answer for anything but the promisor's own responsibility, and need not be in writing."

In cases of this kind the promisor is personally concerned in the payment of the debt, for thereby his property is relieved of it. Possibly there is stronger reason for saying that the promise in cases of this kind is not within the statute than that in cases of the other kind. The ground upon which this may be so is this: According to the phraseology of the statute, the only promise which is within it is one to answer for the debt of another person. This means that the debt shall be solely and exclusively the debt of the third person, and not that of the promisor. Where the creditor has a lien, or the right to take out a lien, on the property of the promisor to secure the debt, it may be said that in a sense it is not solely and exclusively the debt of the third person, but is also the debt of the promisor. This is so, in that the property of the promisor is obligated to the payment of the debt. If this reasoning is sound, then it can be said that the ground upon which such a promise is not within the statute is that it is not covered by its phraseology.

This, however, cannot be said of the promise in cases of the other kind. But in reality, notwithstanding the creditor has such lien, or the right to take it out, the debt is solely and exclusively the debt of the third person. In no real sense is it the debt of the promisor. The ground, therefore, upon which to place it that the promise is not within the statute, is that which we have set forth. The statute, according to its thought, covers only a promise to answer for the debt of a third person by one who has no personal concern in the debt. It does not cover a promise by one who has a personal concern therein; and in such a case the promisor has such concern. His property is obligated for it, and by its payment will be relieved of the obligation. If, then, such is the true ground thereof, it follows that in any case where the promisor has a personal concern in the debt, whatever may be the basis thereof, the promise is not within the thought of the statute, and hence not within the statute. The decisions in cases of this kind, therefore, that the promise is not within the statute, indirectly uphold the position that the promise in cases of the other kind are not within it.

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We have stated that these decisions can and should be placed on the ground that the statute only covers a promise made by a person who had no personal concern in the creation or payment of the debt, as the case may be, the promises involved therein not being so made, but by one who had such concern, not that they were actually placed on this ground.

Indeed, it cannot be said that the courts who rendered them were clearly conscious that the decisions could be justified on the reasoning which we have put forth. From the quotations made it will be seen that the ground expressed is that the leading object of the promisors is to subserve some pecuniary or business purpose of the promisor. Sometimes the ground is stated to be that a new consideration or benefit has moved to the promisor; and the fact of personal concern has a tendency to support the contention that the promise was absolute, and not a conditional one, and hence not within the statute on this ground. The decisions themselves have been much criticized, though it is recognized that what they stand for is established law. It has been urged that such promises come within the terms or language of the statute, that to exclude them is judicial legislation and that the rule which they establish is anomalous. It has been suggested that, if the promisor is to be liable at all, it should not be on the promise, but in quasi contract for the benefit received.

The decisions have also been a source of error in the reasoning on which they have been based, in that it has sometimes been thought that they were authority for the position that, in every case where a consideration moves to the promisor, the promise is within the statute, which is not the case. We would submit that the position that it is the thought of the statute that only a promise by a person who has no personal concern in the creation or payment of the debt to which it relates is within it is reasonable. It cannot be said that a promise by a person who has such concern therein is within the terms or language of the statute. The statute is silent as to the person by whom the promise is made. It is no more within the terms or language thereof than a promise to answer otherwise than out of the promisor's own estate, or than a promise to answer to the debtor or one other than the creditor. The position, therefore, reads no exception into the statute. It is simply one of three limitations on its scope, which one is constrained to put when one passes through its unlimited phraseology to its thought and looks at that phraseology from the other side. And there is nothing in this position that is calculated to lead one into error. Of course, some limitation must be put upon the words "personal concern." The concern must be such as that which existed in the cases cited and others like unto them; i. e., immediate and pecuniary.

If, then, the views here advanced are sound, a full expression of the thought of the statute as to the character of the promise covered by it would be somewhat like this: It is a promise to answer for the debt of another (i. e., to pay if he does not), made to the creditor by one who has no personal concern in the debt, the answering therefor to be out of his own estate.

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Wald's Pollock on Contracts (3d Ed. by Williston) p. 169, characterizes the contract to which the statute relates as "a contract of suretyship or guaranty." Ames, in his Lectures on Legal History, p. 95, characterizes it as "guaranty." And such is what we take to be the ordinary conception of a contract of suretyship or guaranty. In order, then, to bring a promise within the statute, it is not sufficient that it is a promise to answer for the debt of another; i. e., to pay his debt if he does not. The promise must also be to the creditor by one who has no personal concern in the debt, and to pay same out of his own estate. Though it may be a conditional promise, if it is not to the creditor, or not by one who has no personal concern in the debt, or is not to pay it out of the promisor's own estate, it is just as much not within the statute as it would have been, had it been, not a conditional, but an absolute, promise.

[4] We come now to apply the legal positions thus advanced to the case in hand. The defendant had a personal concern in the creation of so much of the debt as was created after the making of the promise, and in so much thereof as had been theretofore created. It had such concern in the creation of the former portion, for it would result from plaintiffs' continuing to deliver lumber, and thereby the completion of the work which the Heffron Company had contracted to do would be furthered. It had such concern in the payment of the latter portion, for thereby its property would be relieved of the lien which plaintiff had a right to take out. Such being the case, the defendant's promise, whatever may have been its character, was not within the statute.

But this is not the only ground upon which it can be said that the promise was not within the statute. To say the least, it was open for the jury to find that the promise was to answer for the debt, not out of its own estate, but out of the Heffron Company's funds. There yet remained to be paid it under the contract over $6,000, of which over $2,000 had been already earned. By the company's contract with defendant it had the right to apply subsequent payments to this indebtedness, and under the contract, and the bond given simultaneously therewith, defendant had recourse against it and the surety company for any deficiency. It must be held, therefore, that this ground of the motion for a peremptory instruction is not well taken.

[5] The other ground is that the officer of defendant who made the promise was without authority to make it. The title of the officer who made the promise on behalf of defendant was comptroller. His duties had to do with the auditing and treasury departments of defendant. He was the supervisor of both departments. The one settled accounts against defendant, and the other paid them. It was a part of his duty to raise money to enable defendant to pay its accounts, and to collect accounts due it. At times he acted as vice president, and at others as treasurer. The question whether it was within the scope of his employment was submitted to the jury. We think it clear that it cannot be said, as a matter of law, that he was without authority. The promise had relation to the payment both of defendant's indebtedness to the Heffron Company and of its indebtedness to plaintiffs, for the latter of which a lien might be taken.

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We have considered the other assignments of error carefully, and find them not well taken. There has been no such presentation of them as calls for a further response thereto.

Finding none of the assignments well taken, the judgment of the lower court is affirmed.

(258 Fed. 180)

THE ADDISON E. BULLARD.

ALLEN et al. v. TURNER et al.

(Circuit Court of Appeals, Fifth Circuit. April 17, 1919. Rehearing Denied June 25, 1919.)

No. 3348.

1. CONTRACTS ⟸163—CONSTRUCTION—PRINT AND TYPEWRITING.
When a contract is in part printed, and in part written or typewritten, the printed part is to be given the effect called for by its language, except in so far as inconsistent or incompatible with the written or typewritten part.

2. SHIPPING ⟸49(5)—FREIGHT—LIEN—CREATION BY CHARTER.
A lien may be created by contract between the parties to a charter, not only for freight, but for dead freight, demurrage, and as many more of the usual claims of the shipowner as he may choose to name.

3. SHIPPING ⟸49(5)—FREIGHT—LIEN—STIPULATION OF CHARTER.
Where the charter of a schooner stipulated that all freight to accrue was to be prepaid, that prepaid freight was to be considered as earned and to be irrevocable, and that the vessel had a lien for all freight, the lien was given and made enforceable for the freight from the time it was due to be prepaid, irrespective of whether the vessel had broken ground at the port of loading.

4. EVIDENCE ⟸394—PAROL EVIDENCE AFFECTING CHARTER PARTY.
Plain terms of contract between shipowners and charterers embodied in the charter party are not subject to be modified by evidence of communications by telephone and telegraph between the charterers and ship brokers with reference to the chartering of the vessel.

5. SHIPPING ⟸44—CHARTER PARTY—RIGHTS OF CHARTERERS—COAL AS "PROVISIONS."
Charterers of a schooner, entitled to the whole of the vessel, with the exception of necessary room for crew and storage of "provisions," sails, and cables, were not deprived of space to which they were entitled because the owners of the schooner stored on its deck in lockers 35 or 40 tons of coal to operate the donkey engine, heat the cabin, and discharge cargo.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Provision.]

6. SHIPPING ⟸58(2)—CHARTER PARTY—"DECK LOAD."
On libel by the owners of a schooner against a cargo of lumber and timber, evidence held to support the conclusion that the timber and lumber carried on the so-called flush deck and the deck next thereunder constituted a full "deck load," within the meaning of the charter party stipulation on the subject.

Appeal from the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Libel by Horace Turner, managing owner, and J. C. Bush and others, owners, of the American schooner Addison E. Bullard, against

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Biddle W. Allen and Camille J. Friedrichs, doing business as Allen & Friedrichs, and the M. A. Quina Export Company. From a decree for libelants (252 Fed. 241), defendants appeal. Affirmed.

John C. Hollingsworth, of New Orleans, La., for appellants.

Scott M. Loftin, of Jacksonville, Fla., for appellees.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This was a libel in admiralty by the owners of the American schooner Addison E. Bullard against the cargo of timber and lumber loaded thereon at the port of Pensacola, and Allen & Friedrichs, the charterers "of the whole of said vessel (with the exception of the cabin, and the necessary room for crew and storage of provisions, sails, and cables), or necessary room for the cargo hereafter mentioned"; the thereinafter mentioned cargo being "lawful merchandise, understood no explosives to be shipped." The claim was for the amount of the charter rate of freight on 2,250 tons of cargo, and was based on the terms of a charter party by which the charterers agreed to pay the libelant—

"For the use of said vessel during the voyage aforesaid at the rate of *thirty and 00/100 dollars ($30.00) per gross ton of 2,240 pounds delivered to vessel, but charterers to pay freight on not less than 2,250 gross tons, vessel's dead weight capacity. Freight prepaid on signing bills of lading, payable in United States currency. Prepaid freight earned, retained and irrevocable.* * * * It is understood and agreed that the vessel has a lien upon the cargo for all freight, dead freight and demurrage."

The libel averred that the schooner was by the charterers loaded with a full and complete cargo of timber and lumber, that such cargo was less than 2,250 tons in weight, and that the charterers and their agents refused to pay freight at the charter rate on 2,250 tons of freight, but insisted on the master signing clean bills of lading for the cargo upon the charterers' paying a much less sum, and that the master offered and remained willing to sign bills of lading for the cargo upon the payment of freight at the charter rate on 2,250 tons. After the libel was filed, under an agreement made, the vessel accepted without prejudice an amount less than that claimed, signed bills of lading for the cargo, proceeded on the voyage, and delivered the cargo at Genoa, Italy, the destination stated in the bills of lading. It was provided in that agreement that the question of the libelant's right to the amount of the difference between what was so paid and what libelant claimed should be adjudicated in this case. The appeal is from a decree sustaining the libelant's claim.

[1-3] The claim asserted was resisted on the ground that no maritime lien arose or existed at the port of loading prior to the vessel's breaking ground. Based upon the circumstances that the charter party was partly printed and partly typewritten—the italicized part of the last above quoted provision being typewritten, the remainder of that provision being part of the printed form made use of—and upon the proposition that the typewritten part is controlling, it is contended that no lien was given for the freight agreed to be prepaid, and that

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for the alleged breach of that stipulation the only remedy available to the shipowners was an action at law on the contract. This contention cannot be sustained if effect is given to the printed stipulation:

"It is understood and agreed that the vessel has a lien upon the cargo for all freight, dead freight and demurrage."

When a contract is in part printed and in part written or typewritten, the printed part is to be given the effect called for by its language, except in so far as it is inconsistent or incompatible with the written or typewritten part. There is no inconsistency or incompatibility between the last-quoted provision and the typewritten part of the charter party. The stipulations to the effect that freight was to be prepaid on signing bills of lading, and that prepaid freight was to be considered as earned, and was to be retained and irrevocable, are entirely consistent with the stipulation to the effect that the vessel has a lien for all freight, dead freight and demurrage. A lien may be created by contract between the parties, not only for freight, but for dead freight, demurrage and as many more of the usual claims of the shipowner as they may choose to name. The Peer of the Realm (C. C) 19 Fed. 216. Where, as in the instant case, it is stipulated that all the freight to accrue is to be prepaid, that prepaid freight is to be considered as earned and to be irrevocable, and that the vessel has a lien for all freight, it is made clear that a lien is given and made enforceable for the freight from the time it is due to be prepaid. The language used in the charter party does not leave it in doubt that what was required to be "prepaid on signing bills of lading" was freight in the sense in which that word is understood in maritime law. The Bird of Paradise, 5 Wall. 545, 18 L. Ed. 662. Under such a contract the accrual of the lien is not postponed until the vessel breaks ground. International Paper Co. v. Schooner Gracie D. Chambers (Jan. 13, 1919) 248 U. S. 387, 39 Sup. Ct. 149, 63 L. Ed. 318; Allanwilde Transport Co. v. Vacuum Oil Co. (Jan. 13, 1919) 248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. 312; Standard Varnish Works v. Steamship Bris (Jan. 13, 1919) 248 U. S. 392, 39 Sup. Ct. 150, 63 L. Ed. 321. As said in the opinion rendered in the last-cited case:

"The words 'prepaid freight to be considered as earned' declared a completed right and carried the power of retention without the expression of the latter."

An incident of the completed right is the power to enforce the lien given to secure it. When the vessel was loaded with a full and complete cargo, as stipulated in the charter party, the lien for the stipulated charter hire attached upon the tender of bills of lading for such cargo and the refusal of such tender by the charterers, and it was not in the power of the latter to postpone the attaching of the lien contracted for and its becoming enforceable by making it a condition of the acceptance of the tendered clean bills of lading for the cargo loaded that they be issued upon the payment of less than the stipulated charter hire. The averments of the libel showed that at the time it was filed the libelants had a lien on the cargo which was enforceable in a court of admiralty. Rulings as to the effect of

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charter parties containing stipulations for the prepayment of freight, but not containing such provisions as those found in the charter party now in question to the effect that freight prepaid as stipulated is earned and irrevocable, and that the vessel has a lien upon the cargo for all freight, dead freight and demurrage, are not applicable to the facts of the instant case.

[4] The averments of the libel that the vessel was loaded with a full and complete cargo of timber and lumber were put in issue. The evidence on this issue was conflicting. It is not fairly open to dispute that a phase of it supported the averments of the libel in that regard. The trial court found that those averments were proved. The record by no means convinces us that the finding was against the preponderance of the evidence. The contract entitled the charterers to furnish a cargo of any lawful merchandise other than explosives. It was optional with them to ship heavy cargo to the extent of the vessel's dead weight capacity if the freight room not excepted or reserved would hold that much, or to ship light weight cargo, less than 2,250 tons of which would fill the freight space contracted for. They exercised the option by furnishing a cargo of timber and lumber, a considerable part of it being light weight kiln-dried lumber. It is plain that it was in view of the existence of this option that it was stipulated that the charterers were "to pay freight on not less than 2,250 gross tons, vessel's dead weight capacity." That was the stipulated compensation to be paid to the shipowners, whether the full and complete cargo shipped by the charterers did or did not amount to 2,250 gross tons. Over objections by the shipowners, the charterers introduced evidence of communications by telephone and telegraph between the charterers and shipbrokers with reference to the chartering of the vessel. That evidence was relied on to support the conclusion that the compensation to be paid was $30 per ton on the cargo furnished, and that no minimum amount of freight was stipulated for. Even if the brokers were authorized to speak for the shipowners, which was not shown, the plain terms of the contract between the parties, embodied in the charter party, are not subject to be altered or modified by such evidence. The charter party alone is to be looked to as the expression of the final understanding of the parties. Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622.

[5] The charterers raised the issue that they were deprived of cargo space to which they were entitled in consequence of coal being loaded in such space. The evidence showed that between 35 and 40 tons of coal were loaded in lockers on deck, provided for the purpose, and that that amount was necessary for the operation of the donkey engine, which was used in hoisting anchors and sails, heating the cabin and discharging cargo. The provision of the charter party, "vessel to furnish the use of the steam winches, with steam to drive them," shows that it was contemplated that some coal was to be carried. By the terms of that instrument the charterers were entitled to the whole of the vessel, "with the exception of the cabin, and the necessary room for crew and storage of provisions, sails and cables." The statement in the testimony of a witness for the charterers to the effect

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that the word "provisions" included such a supply of coal as was taken on for the purposes stated was not contradicted. The word is appropriate to describe necessary stores or materials provided to enable the ship to comply with its obligations under the contract. The evidence was such as to warrant the conclusion that the storage in bunkers on deck of the amount of coal mentioned did not deprive the charterers of space to which they were entitled.

[6] In this court the appellants seek leave to amend their answer to the libel by averring that the beams supporting the topmost deck, sometimes called the flush deck, were so light as to be structurally insufficient to carry the full and complete deck load provided for by the charter party; that such defect shut the charterers out of having a full and complete load on the flush deck, thereby causing alleged damages, a recovery of which is prayed in the amendment sought. The allowance of the proposed amendment would introduce entirely new issues which were not raised in the trial court. The case was tried without any question as to the vessel being such as the charter party called for being raised by any part of the pleadings. The amendment is sought to enable the charterers to show by the evidence already adduced that the alleged lightness of the beams supporting the topmost deck constituted breaches of the charter party's stipulations as to the vessel being "tight, staunch, strong and in every way fitted for such a voyage," and as to its taking on "a full complete deck load consistent with the vessel's seaworthiness." The parties seeking the amendment do not ask to introduce additional evidence.

Waiving the question raised by the objection of the appellees to the allowance of the proposed amendment in this (the appellate) court, the matter we think properly may be disposed of on the ground that, if the new issues sought to be raised had been duly raised by the pleadings in the trial court, on the evidence adduced they could not properly have been decided in favor of the appellants. What is called the flush deck is really the roof or top of a structure which incloses the space above the upper or main deck; the principal object of that structure being to protect from the weather cargo loaded on the deck next below the top of such structure. While it is customary to load some cargo on the so-called flush or shelter deck, we think the evidence was such as to require the conclusions that the flush or shelter deck was not the space contemplated by the stipulation as to taking on "full complete deck load consistent with the vessel's seaworthiness," and that the alleged lightness of the beams supporting such topmost deck was not a breach of the stipulation as to the vessel being "tight, staunch, strong and in every way fitted for such a voyage." Nothing in the charter party shows that the vessel was bound to receive and store on the so-called flush deck a full and complete deck load.

The evidence was such as to support the conclusion that the timber and lumber carried there and on the deck next thereunder constituted a full and complete deck load within the meaning of the charter party's stipulation on the subject. Neither the stipulation as to the vessel being "tight, staunch, strong and in every way fitted for such a voyage" nor any other provision of the charter party dealt with

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the question of the cargo-carrying capacity of the topmost or flush deck. That unprotected space was not warranted to be fit for the carriage of any amount of lawful merchandise the charterers were entitled to offer. As the contract did not entitle the charterers to complain on the ground that the lightness of the beams supporting the topmost or flush deck rendered it structurally insufficient to carry a full and complete deck load, and as the evidence called for the conclusion that such a deck load as the contract contemplated was received and carried, the appellant can have no just cause to complain of a refusal to permit the proposed amendment, assuming that it is permissible to allow such an amendment in the appellate court.

For reasons above indicated, the proposed amendment is disallowed, and the decree appealed from is affirmed.

(258 Fed. 185)

ARMOUR & CO. et al. v. TEXAS & P. RY. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. May 5, 1919.)

No. 3360

RAILROADS ⊂=54—REMOVAL OF TRACK—RIGHT TO EQUITABLE RELIEF—PUBLIC INTERESTS—LEGAL REMEDY.

Though meat-packing companies, acquiring valuable abutting property adapted to their business, have a contract or property right to prevent removal from a street of an industry track serving them, they cannot have relief by injunction against the city, the railroad company, and a trackage company, to restrain removal of the track to another street, when it appears that paramount public interests may be interfered with by granting relief, especially where there is no convincing showing of a lack of legal remedy for damages.

Appeal from the District Court of the United States for the Western District of Louisiana; Rufus E. Foster, Judge.

Suit against the Texas & Pacific Railway Company, wherein Pearl Wight was appointed receiver, and Armour & Co., a New Jersey corporation, and Armour & Co. of Texas, a Texas corporation, filed an intervening petition. From a decree dismissing the petition, the interveners appeal. Affirmed.

Sam B. Cantey, of Ft. Worth, Tex., and Francis Marion Etheridge and Joseph Manson McCormick, both of Dallas, Tex., for appellants.

Thomas J. Freeman and H. Generes Dufour, both of New Orleans, La., for appellees.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This is an appeal from a decree dismissing an intervening petition filed by the appellants, Armour & Co., a New Jersey corporation, and Armour & Co. of Texas, a Texas corporation, in a suit in which the receiver of the Texas & Pacific Railway Company (which will be referred to as the Railway Company) was appointed. The appellants sought an injunction to prevent the

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Railway Company and its receiver from executing a contract to remove, and from removing, the tracks on Pacific avenue, in Dallas, Tex., including a switch or industry track serving the petitioners' plant.

The pleadings and evidence in the intervention proceedings disclosed the following facts:

For many years prior to 1912 the Railway Company had and used tracks on Pacific avenue, in the city of Dallas; its authority to do so being conferred by municipal ordinances. In July, 1912, the authorities of the city of Dallas passed an ordinance granting the Railway Company the right and privilege to construct a switch track on Pacific avenue; the location of that track being designated. That ordinance contained the following provisions:

"Sec. 2. That the right, privilege, and franchise hereby granted is granted subject to the city charter and ordinances of the city of Dallas and such future charters and ordinances as may hereafter be passed, and the city expressly reserves the right to at all times amend or alter the ordinance hereby granted.

"Sec. 3. That the right and privilege hereby granted is granted for a period of twenty years from the date of the acceptance of this ordinance, as herein provided for, and provided that in the event the said Railway Company shall be required to abandon, to elevate or to place in subways said main tracks on Pacific avenue, then in that event this franchise shall be subject thereto, and the said grantee shall, during said time, pay, on the second day of January, in each and every year, the sum of ten dollars per year, as a bonus for the right, privilege, and franchise hereby granted: Provided that ten dollars shall be paid for the year 1912.

"Sec. 4. That in accordance with the agreement heretofore made between the city of Dallas and Armour & Co., the owners of a certain lot located on the north side of Pacific avenue, and more particularly located on the northwest corner of Pacific avenue and Harwood street, and extending back to Live Oak street, which switch track is intended to serve said property, it is mutually understood and agreed that as a further consideration for this grant the grantee shall obtain from the said Armour & Co., or the said Armour & Co. shall dedicate to public use sixty-four square feet of land located at the southeast point of its said lot, where the same forms a corner of Harwood and Pacific avenue, and shall likewise dedicate to public use for street purposes thirty-five square feet off the northeast corner of its said lot, where the same forms the southwest corner of Harwood street and Live Oak street; it being the purpose of the said dedication to round the corners at such points and to dedicate such property for street purposes, and it being understood that it requires the amount of square feet herein stated to round off said corners, all of which more fully appears from map on file in the office of the city engineer of the city of Dallas. That the dedication of said property shall be made by the said Armour & Co., whose property is served by said switch, before the final acceptance of this ordinance by the grantee herein.

"That in the event the said Armour & Co. should fail or refuse to make said dedication, it is expressly understood between the parties that the city of Dallas may repeal and cancel the rights and privileges granted under this ordinance, by resolution or otherwise."

Armour & Co. made the dedication called for by the last-quoted provision. Before the adoption of the ordinance it was submitted to the attorney of Armour & Co., and was approved by him, and Armour & Co. conditionally contracted to buy the lot described in the ordinance, and after the adoption of the ordinance bought the lot and made the required dedication. Armour & Co.'s attorney had oral ne-

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gotiations with the Railway Company's general attorney and with its general manager, and both those officials were advised that Armour & Co.'s purchase of the lot was conditioned upon the switch track being authorized and constructed, and the Railway Company's general manager assured an agent of Armour & Co. that if the city granted the franchise the Railway Company would put in the switch and maintain and operate it. Following Armour & Co.'s purchase of the lot and the adoption of the ordinance, it had built on the lot a steel reinforced concrete structure exclusively adapted to its business, which includes the refrigeration, smoking, drying, treatment, and curing of meats. The lot and the improvements thereon cost about $130,000. The business in which the property is used is an extensive and valuable one. If the switch track in question is removed, that property would not be available for use in the business for which it was acquired and for which it has been and is used. The business is carried on by Armour & Co. of Texas, which holds the property under a lease contract with Armour & Co., the substance of which, as stated in the summary of the evidence, is that the former pays the latter a net rental of 8 per cent. of the entire value of the property and plant, including taxes, charges, etc.

A result of the growth of Dallas since the Railway Company commenced to use Pacific avenue for its tracks is that there has been a great increase both of railway and other traffic on that street, and of other traffic along the streets crossing Pacific avenue in the locality of the switch track in question. Pacific avenue divides the principal residence section of the city from its principal retail and shopping district. The next street to it in the direction of the leading retail district was spoken of by one of the witnesses as "probably the most used thoroughfare of the city." Traffic in that locality has become greatly congested. The public interest and safety call for either the lowering or raising of these tracks, or the removal of them from Pacific avenue. The continuance of the tracks on the same grade as the street involves constant and increasing danger and inconvenience to many persons. There was evidence to support the conclusions that it is impracticable to lower the tracks on that street, because the lowering of them to the required depth would subject them to being flooded whenever Trinity river, to which the tracks go, is at high-water mark, and that the elevation of the tracks, besides being very expensive, could not be so effected that the industries located on that street could continue to be served by the Railway Company as they are served by the tracks on the street grade. For years past there has been public agitation against the continuance of the conditions on Pacific avenue resulting from the presence on it of the railway tracks.

In the circumstances above indicated the city of Dallas, the receiver of the Railway Company, and the Wholesale Trackage Company, a corporation, agreed upon the terms of a contract providing for the removal of the railway tracks from Pacific avenue and the discontinuance of the use of the street for railway purposes, except that a track serving one industry was to be continued for a specified time, and those required for the operation of certain passenger trains of another

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railroad which had acquired a right to use the street were to be continued in use for that purpose, unless other arrangements could be made for those trains, and for the acquisition by the Railway Company of a route for its tracks through another and less congested part of the city, which included a new industrial district, industries located on which could be served by the Railway Company. By the terms of that contract a large part, if not most, of the expense involved in making the proposed change was to be borne by the Wholesale Trackage Company; the money required for that purpose being contributed by owners of real estate expected to be benefited by the proposed change, some of the contributors being owners of lots on Pacific avenue, some of them being owners of nearby real estate which is separated from the heart of the city's retail business section by Pacific avenue, and the remainder being owners of real estate in the industrial district to be established and developed. After permits to make the proposed change had been obtained from the public authorities, the Railway Company's receiver filed in the cause, in which the petition of the appellants was filed, a petition praying that he be authorized by the court to execute the above-mentioned contract, which was the same one the execution of which the appellants sought to have enjoined. Following findings, supported by evidence adduced, that the consummation of the contract mentioned will be highly advantageous to the Railway Company and the citizens of Dallas, the court made a decree denying the injunction sought by the appellants, authorizing the receiver to enter into the proposed contract, and dismissing the petition of the appellants, without prejudice to any rights they may have hereafter to sue for such damage as may be occasioned them by the removal of the tracks in question.

The claim that the appellants have a contract or property right to the continued use of the switch track in question is based upon the circumstances that one of them was instrumental in procuring the adoption of the city ordinance granting the right to use the street for that purpose and dedicated a part of its lot to secure the granting of that franchise; that, before doing so, it was assured by the officials of the Railway Company that the latter would put in the switch and operate it if the city granted the required franchise; and that property was bought and improved in reliance on such assurance. It is not claimed that the switch track was paid for or is owned by the appellants, or either of them. If they have the right claimed, there is no corresponding obligation on either of them to continue to use the switch track. So far as appears, each of them retains the unconditional right to cease at any time to make use of that track or to carry on the business which is served by it. If there is a contract for the continued operation of that track, it is one which is not specifically enforceable against the appellants or either of them. The Railway Company's receiver was not a party to a contract on the subject, if there was one. To enjoin him from removing the switch track would amount to requiring specific performance by him of a contract to which he is not a party, and which is not specifically enforceable against the appellants at his instance. There is no mutuality of either

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obligation or remedy. The reciprocal feature of the duty of specific performance which is enforceable in courts of equity is not to be lost sight of. It is a recognized ground for refusing redress by specific performance that it could not successfully be sought against the party applying for it. Where there is such a lack of mutuality, it is an additional impediment in the way of granting the exceptional equitable remedy of specific performance that the party seeking it fails to show that he has not a full, complete and adequate remedy at law for the damage, loss, or injury suffered in consequence of the threatened breach of duty sought to be specifically enforced. To say the least, there was no convincing showing of a lack of an available and adequate legal remedy.

The petition of the appellants contains general statements to the effect that irreparable loss and damage will be occasioned to them by the threatened removal and abandonment of tracks on Pacific avenue serving their plant. The pleadings and evidence do not disclose facts requiring the conclusion that appellants cannot obtain compensation at law to which they may become entitled for the loss or damage caused by the removal of the tracks. If the appellants have a cause of action against any one based upon a discontinuance of the tracks, it is against the city of Dallas and the Texas & Pacific Railway Company, one or both. The insolvency of neither of those parties is shown. It was not shown that the proposed removal was to be so effected as necessarily to cause the interruption or cessation of the business of the appellants in Dallas. While it is shown that the value of the structure in which that business is conducted would be impaired by removal of the track, it is not satisfactorily shown that the value of the lot with the structure on it would be less after the railway track shall have been removed from the street than it was before. There was evidence tending to prove that the value of property on Pacific avenue would be enhanced by the removal of the tracks. It is not shown that the business of the appellants cannot as well and profitably be carried on in the proposed new industrial district, or in another part of Dallas, where railroad facilities would be obtainable. If the record be regarded as showing that any one is liable to the appellants for a loss resulting to them from such a change, it cannot be regarded as convincingly showing that they are without a full, complete, and adequate legal remedy for the enforcement of that liability.

It is not necessary to decide whether the foregoing considerations by themselves are enough to justify the refusal to grant an injunction having the effect of preventing the discontinuance of the use of railroad tracks on Pacific avenue, so far as concerns the serving of the plant of the appellants. The continuance of the conditions resulting from the use of that street by the Railway Company is not only a hardship on that company, subjecting it to burdens and liabilities which may be escaped or materially lessened by a practicable change of location, an advantageous opportunity to make which is offered, but is against the public interest. The street has become such a one that the continued use of it by the Railway Company is not compatible

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with the safety and convenience of a populous community. If the appellants have the contract or property right claimed as the basis of the relief sought, it does not follow that they can obtain that relief when it appears that paramount interests will, or even may, be interfered with by granting it. Beasley v. Texas & Pacific Ry. Co., 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274; Texas & Pacific Ry. Co. v. City of Marshall, 136 U. S. 104, 10 Sup. Ct. 846, 34 L. Ed. 385; Northern Pacific R. Co. v. Territory of Washington, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092. In the opinion in the last-cited case it was said:

"The court will never order a railroad station to be built or maintained contrary to the public interest."

Change in local conditions may make it against the public interest for such railroad operations as the Railway Company is engaged in to be carried on in a street in the heart of a city along and across which there is considerable and increasing traffic of other kinds. Certainly a court is justified in refusing an injunction sought as a means of enforcing the continued use for steam railroad purposes of a much-traveled city thoroughfare, especially where it is not made plain that the party seeking such relief cannot in an action at law recover such compensation as it may become entitled to for the loss or damage caused to it by the discontinuance of such use.

The conclusion is that the court did not err in refusing the injunction sought and in dismissing the petition of the appellants without prejudice to their right to enforce whatever liability to them may be incurred by the proposed removal of the track in question.

The decree to that effect is affirmed.

(258 Fed. 190)

OKLAHOMA CITY v. ORTHWEIN.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 4936.

1. COURTS ⟸107—PAVING—ASSESSMENT OF BENEFITS—STREET RAILROADS.
A decision of the Supreme Court of Oklahoma, construing state statutes and holding that the right of way of a street railroad company is assessable for paving benefits, where it is held in fee, *held* to also apply to right of way held by grant without reverter.

2. JUDGMENT ⟸708—JUDGMENT AS EVIDENCE—INVALIDITY OF ASSESSMENTS.
In an action against a city, based on its alleged neglect and refusal to make a reassessment of benefits to pay paving bonds, to supply the deficiency caused by its assessment of property which was not subject thereto, a judgment recovered against the city by the owner of such property, declaring the assessment invalid and enjoining its enforcement, *held* admissible in evidence.

3. MUNICIPAL CORPORATIONS ⟸374(1)—CONTRACT FOR PUBLIC IMPROVEMENTS —LIABILITY FOR NONPERFORMANCE.
Where a municipal corporation, which has power to make a contract for internal improvements, contracts for them and stipulates that the agreed price shall be paid out of funds to be realized from special assess-

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ments, which it has power to make, but fails and refuses to make sufficient valid assessments, it becomes primarily liable to pay the contract price itself.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action at law by Walter E. Orthwein against the City of Oklahoma. Judgment for plaintiff, and defendant brings error. Reversed in part.

B. D. Shear, A. T. Boys, and E. E. Blake, all of Oklahoma City, Okl., and W. M. Howenstein, of Grandfield, Okl., for plaintiff in error.

G. A. Paul, of Oklahoma City, Okl., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

CARLAND, Circuit Judge. The city of Oklahoma City in 1908 deemed it necessary to pave Classen boulevard. In 1911, it deemed it necessary to pave Linwood boulevard, from the west line of Western avenue to the center line of Tenth street, and also Exchange avenue. Proceedings were regularly taken as provided by law for the construction of said paving. The benefits resulting from said paving were assessed upon the lands fronting or abutting thereon. The contractor constructing the paving was paid by the issuance by the city of improvement bonds, to be paid by the money arising from the collection of the assessments made for benefits. The defendant in error, hereafter plaintiff, purchased all the improvement bonds issued for said paving from the contractor, for value, and without notice of any defect in the benefit assessment.

Along the center of Linwood boulevard, Exchange avenue, and Classen boulevard, an electric railway company, hereafter Railway Company, occupied and used a right of way which it had curbed and otherwise improved. The paving done by the city on the boulevards and avenue above mentioned was on the driveways located on both sides of the right of way. The Railway Company refused to pay the amount of the benefits assessed against it, and this fact prevented the accumulation of a sufficient fund to pay all the improvement bonds and interest thereon. The Railway Company claimed that its right of way did not front or abut upon the pavement, within the meaning of the law authorizing the construction of the pavements. Under these conditions the plaintiff made a demand upon the city to cause a new assessment of benefits upon property liable therefor, in order that the bonds owned by him could be fully paid. The city having, as claimed by the plaintiff, unreasonably delayed to make a new assessment, the present suit was brought against the city on the theory that it was liable on account of its willful neglect and refusal to perform a duty imposed upon it by law to create a fund necessary and essential under the obligations contained in the bonds for the purpose of meeting the payment of the installments and interest due thereon.

There were four paving contracts involved in the improvement mentioned, two for Exchange avenue, and one each for the boule-

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vards. The complaint in this action was in four counts, corresponding to the four contracts. The trial below resulted in a directed verdict for the plaintiff as follows: First count, $653.10 and interest; second count, $2,744.68 and interest; third count, $754.14 and interest; fourth count, $4,076.02 and interest. The recovery was measured by the invalid portions of the assessments shown by the four ordinances levying the same and recited in the bonds owned by the plaintiff. The only ground of invalidity urged against the assessments was that the right of way of the Railway Company was not assessable for benefits. The trial court sustained this view. Judgment having been entered on the verdict, the city has brought the case here for review.

Before, however, proceeding to consider the assignments of error, it is proper to say that, since the trial of this case below, the Supreme Court of Oklahoma, in the case of Oklahoma Railway Co. v. Severns Paving Co. et al., 170 Pac. 216, a case involving the right of the city of Oklahoma City to assess the right of way of the Railway Company for benefits resulting from paving of the character described in this action, has decided that, where the Railway Company's title to its right of way amounts to a fee title, the assessment of benefits for paving is valid. The decision of the Oklahoma Supreme Court in the case cited was based upon a construction of the statutes of Oklahoma and particularly sections 511, 1175, and 1382, Laws of Oklahoma 1910, and is binding on this court so far as it construes said statutes. The Supreme Court of Oklahoma in the above case affirmed a judgment awarding a mandamus compelling the defendant to make a new assessment. The record in the present case shows that, as to the paving mentioned in the first count, the grant of the right of way of the Railway Company was in perpetuity. The right of way involved in the second and third counts was obtained in part by a grant from the Park Site Realty Company for use as a right of way, with reverter to the grantor upon the abandonment or discontinuance of such use, and in part by dedication from the Packing House Development Company in fee simple and as a right of way without limitation, and in part by grant from Edward Morris, with right of reverter in the grantor in case of the abandonment of such right of way.

[1] In view of the decision above mentioned and the statutes therein construed, we are of the opinion that the assessment of benefits for the paving involved in this action was valid, where the title of the Railway Company to its right of way was in fee, or where it was for a right of way without reverter. There are no data in the record by which we can compute in dollars and cents the invalid or valid portions of the assessments involved in the second and third counts, and the case will have to be remanded, in order that the proper computation may be made. What the title of the Railway Company was, as to the right of way involved in the fourth count, does not appear. The evidence, however, shows that on April 21, 1910, the Oklahoma Railway Company commenced action in the United States Circuit Court for the Western District of Oklahoma against the present

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defendant, Bob Parman, city clerk, and Charles McCafferty, county treasurer of Oklahoma county, wherein the assessment involved in the fourth count was attacked as invalid. The defendants filed a demurrer. Subsequently, on April 1, 1912, the Railway Company filed an amended and supplemental complaint, to which the defendants also filed a demurrer. On March 29, 1912, the demurrer was overruled, with leave to answer. No answer being filed within the time limited, an order pro confesso was entered April 25, 1912, and on May 31, 1913, a final decree was entered, declaring the assessment involved in the fourth count of the complaint in this action invalid, and permanently enjoining the defendant from taking any proceedings to collect said assessment. This decree was not appealed from and became final. The court below, being the successor of the Circuit Court, properly followed that decision, and we have no authority on this writ of error to review it. The assessment involved in the fourth count must therefore be regarded as invalid, and the plaintiff, if otherwise entitled to recover, should have judgment on the fourth count.

We now come to consider the assignments of error urged by the defendant. So far as the validity of the assessments for benefits charged against the Railway Company's right of way is concerned, we have already expressed our views following the decision of the Supreme Court of Oklahoma in Railway Co. v. Severns Paving Co., supra. The first count is eliminated from consideration for the reason that the assessment was valid, and the plaintiff is subrogated to the rights of the paving contractor, and can enforce the payment of the benefits assessed for the payment of the paving involved in the first count. The portions of the pavement involved in the second and third counts where the Railway Company's title to the right of way amounts to the fee, under the decision of the Supreme Court of Oklahoma in the case above mentioned, are also eliminated. The question then for consideration is: May the plaintiff recover in this action a general judgment against the city for the proportionate amount of the invalid assessments represented by all of the fourth count and a portion of the second and third? Taking up the assignments of error in their order:

First. There was no error in denying the motion to make the complaint more definite and certain. The matter was discretionary, and no prejudice resulted.

[2] Second. There was no error in allowing the introduction into evidence of the record in the case of Oklahoma Railway Co. v. Oklahoma City et al. It was admissible for the purpose of showing that the assessment involved in the fourth count had been adjudicated invalid. It is true the parties were not the same as in the present action, but that was not necessary. The defendant was a party to that action, and the judgment therein was evidence against it in this case. The record was also evidence that the city had notice that the assessment had been declared invalid. It was also admissible as showing that the defendant had allowed a decree pro confesso to be

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entered against it, and had taken no appeal therefrom, which was evidence of negligence.

Third. There was no error in admitting in evidence the claim filed by the plaintiff with the city officers. It was admissible on the question of notice of the invalidity of the assessments and on the question of negligence.

Fourth. There was no error in admitting the testimony of the witness Shartel concerning the building of sewers to drain the right of way of the Railway Company. While the evidence was not very material, it tended to show that the Railway Company had performed what it thought was its duty in the premises. It was not prejudicial in any event.

Fifth. There was no error in the introduction in evidence of the record in case No. 12380, Cleveland-Trinidad Paving Co. v. City of Oklahoma et al. The record was introduced in rebuttal of the testimony of Whit M. Grant, who had testified that he had no recollection of ever being informed as to the decision of the local district court with reference to reassessments.

Sixth. The claim that the power to pave is under the law and Constitution of Oklahoma given to the city officers, and not to the city, has no merit.

Seventh. When the verdict in this case was directed, the defendant requested the court to limit the judgment, so that it could be collected only from benefit assessments. There was no error in this ruling. The city, if liable at all, was liable generally as for negligence and refusal of duty.

Eighth. It is our opinion that the contractor could have maintained this suit if he still owned the bonds, and, having sold them to the plaintiff, the latter can maintain it. The city owes the duty to levy the new assessment to the one who owns the bonds.

Ninth. We have no dispute with the holding of the Supreme Court of Oklahoma that the determination of the amount of benefits is a legislative act and final, but this rule has no application where the property assessed is not liable for any assessment.

Tenth. The bonds upon which the verdict was directed were payable to bearer. They were all produced in court, and that was prima facie proof that the plaintiff was the owner.

Eleventh. The allowance of an amendment to the complaint at the trial, to the effect that the plaintiff sued for himself and other parties similarly situated, while probably erroneous, was not prejudicial. No recovery was had for any one except the plaintiff.

[3] Twelfth. Section 728, Comp. Laws of Oklahoma 1909, gave the defendant power to levy new assessments where the original assessment was invalid. On July 14, 1913, the plaintiff presented to the defendant his written request to cause reassessments to be made on account of the illegal assessments against the Railway Company's property, which the defendant failed to grant. Thereupon the plaintiff brought suit against the defendant, which was pending for about two years, and no reassessment was made from the time of bringing that suit and the institution of the present suit on April 27, 1915.

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The defendant also allowed the complaint in the case brought by the Railway Company to be taken pro confesso, and never appealed therefrom. The law of Oklahoma, being Session Laws approved April 17, 1908 (Laws 1907–08, c. 10), provided that the city itself should in no case be liable on these improvement bonds; therefore the plaintiff was remediless, unless a valid assessment of benefits should be made and collected. In our opinion, the evidence showed that the city was guilty of negligence and of a willful refusal to make valid assessments to pay the bonds of the plaintiff. The limitation of liability of the city above specified does not, in our opinion, exclude a remedy based upon negligence and willful refusal to perform this duty. Where a municipal or quasi municipal corporation, which has the power to make a contract for internal improvements contracts for them, and stipulates that the agreed price of the improvements shall be paid to the contractor out of funds to be realized out of special assessments, or out of the proceeds of bonds it has the power to issue, and the corporation has power to make the assessments or to issue the necessary bonds, but fails to make sufficient valid assessments, or to issue sufficient bonds to provide the necessary funds to pay the contractor the contract price of his material and labor, or if it misappropriates such funds to other purposes, the corporation becomes primarily liable to pay the contract price itself. Barber Asphalt Paving Co. v. City of Denver, 72 Fed. 336, 340, 19 C. C. A. 139, 143; Bill v. City of Denver (C. C.) 29 Fed. 344; Argenti v. City of San Francisco, 16 Cal. 256, 281, 283; Beard v. City of Brooklyn, 31 Barb. (N. Y.) 142, 150; Commercial National Bank v. City of Portland, 24 Or. 188, 33 Pac. 532, 41 Am. St. Rep. 854; City of Louisville v. Hyatt, 5 B. Mon. (Ky.) 199, 201; City of Leavenworth v. Mills, 6 Kan. 288, 297; Reilly v. City of Albany, 112 N. Y. 30, 42, 19 N. E. 508; Michel v. Police Jury, 9 La. Ann. 67.

Both parties at the close of the evidence requested a directed verdict. The defendant, however, requested the court, in case his motion should be denied, to charge the jury in certain particulars. These requests to charge have been examined, and they present no reason why the verdict should not have been directed for the plaintiff. The entire record convinces that there is substantial evidence to sustain the verdict directed by the court, and that there was no error committed in this behalf.

The judgment on the first count is reversed. The judgment on the fourth count is affirmed, and the judgment based upon the second and third counts is reversed, and the cause remanded as to those counts, with instructions to the trial court to grant a new trial as to the amount due the plaintiff in the instances where in this opinion the assessment of benefits would be illegal. No costs to be taxed as against either party in this court.

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(258 Fed. 196)

THOMPSON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919. Rehearing Denied September 1, 1919.)

No. 4985.

1. POISONS ⟸2—HARRISON ANTI-NARCOTIC ACT—VALIDITY.
Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), declaring that it shall be unlawful for any person to sell, barter, exchange, or give away enumerated narcotic drugs, except in pursuance of the written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, but excepting physicians duly registered in the course of their professional practice, is constitutional.

2. POISONS ⟸4—HARRISON ANTI-NARCOTIC ACT.
Under Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), declaring that it shall be unlawful for any person to sell, barter, exchange, or give away certain narcotic drugs, except in pursuance of a written order of the person to whom such article is sold, on a form to be issued by the Commissioner of Internal Revenue, but which excepts physicians in the course of their professional practice, etc., it is an offense for a registered physician to sell narcotics.

3. STATUTES ⟸228—PROVISO—CONSTRUCTION.
A proviso in a statute must be strictly construed.

4. POISONS ⟸9—HARRISON ANTI-NARCOTIC ACT—EVIDENCE.
In a prosecution under Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), against a physician who sold large quantities of narcotics to habitual users of the drug, medical testimony as to recognized methods among physicians for treating persons addicted to the use of narcotic drugs was admissible, for the purpose of showing that the accused physician did not come within the exception as to physicians dispensing drugs in the course of their practice, for, while the act is in the guise of a revenue measure, it was intended to accomplish a moral purpose.

5. POISONS ⟸9—OFFENSES—EVIDENCE.
In a prosecution against a physician for violating Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), by dispensing narcotics to habitual users of the drug, the exclusion of a letter from the Commissioner of Internal Revenue in response to a query by defendant physician as to dispensing of narcotics *held* proper.

6. CRIMINAL LAW ⟸1186(4)—APPEAL—HARMLESS ERROR.
In a prosecution for violating Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), exclusion of a letter written by the Commissioner of Internal Revenue, in response to an inquiry of defendant physician as to the dispensing of narcotics, *held* harmless, under Judicial Code, § 269 (Comp. St. § 1246), as amended by Act Feb. 26, 1919, if erroneous.

7. CRIMINAL LAW ⟸1178—EXCEPTIONS—ABANDONMENT.
Where the only exception to the admission of evidence was that the court erred in receiving over objection prejudicial and harmful evidence, and the point was not presented either in the brief or oral argument, the matter will be deemed waived.

8. CRIMINAL LAW ⟸371(1)—EVIDENCE—OTHER OFFENSES—INTENT.
In a prosecution for violation of Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), evidence that defendant, a physician, dispensed the drug to addicts and to persons other than those specified in the indictment, is admissible to show his intent.

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9. Poisons ⟸9—Offenses—Evidence.
In a prosecution for violation of Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), by a physician, who dispensed the drug to many habitual users, evidence *held* sufficient to sustain a conviction.

10. Criminal Law ⟸815(4)—Instructions—Harrison Anti-Narcotic Act.
In a prosecution against a physician for violation of Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), a request to charge that a physician cannot be convicted for dispensing prohibited narcotics in the treatment of a patient whose application is by letter, where the physician reduces the amount of the dose for purpose of treatment, was properly refused, because omitting the indispensable conditions that the physician must furnish the drug in good faith and keep the required record.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Bascom C. Thompson was convicted of violating Harrison Anti-Narcotic Act Dec. 17, 1914, § 2 (Comp. St. § 6287h), and he brings error. Affirmed.

Albert D. Nortoni, of St. Louis, Mo., for plaintiff in error.

Vance J. Higgs, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before SANBORN, Circuit Judge, and TRIEBER and YOUMANS, District Judges.

TRIEBER, District Judge. The plaintiff in error, hereinafter referred to as the defendant, was found guilty by a jury on three counts of an indictment charging him with violations of section 2 of the Harrison Anti-Narcotic Act of December 17, 1914 (38 Stat. 786, c. 1 [section 6287h, U. S. Comp. Stat. 1918]).

There were four counts to the indictment, but by direction of the court the jury returned a verdict of not guilty on the fourth count. The counts are all in the same language, except that each charges the defendant with dispensing morphine sulphate to a different person, at a different time, and in different quantities. Each count charges that the defendant was a physician duly registered with the collector of Internal Revenue of the United States, as required by this act, as a dealer in and dispenser of opium, coca leaves, and their salts, derivatives, and compounds, and that he knowingly, willfully, and not in the course of his professional practice only, sold, bartered, dispensed, and distributed—in the first count to one Louis M. Wood, 88 grains of morphine sulphate, a derivative of opium; in the second count, 468 grains, to Mrs. William Cosgrove; and in the third count, 236 grains, to Pearl Spellman; that the sales were not made in the course of his professional practice only, nor in pursuance of a written order from the purchaser on forms issued in blank for that purpose by the Commissioner of Internal Revenue, as required by the act. Each count then proceeds to negative the other exemptions in the act, although that was unnecessary under the provisions of section 8 of the act (Comp. St. § 6287n).

[1] The defendant attacked the constitutionality of the section of the act under which the indictment was drawn by a demurrer to each

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count of the indictment, again by special requests for instructions to the jury, and after the return of the verdict by a motion in arrest of judgment. The District Court sustained the constitutionality of the act.

Since the submission of this case in this court the Supreme Court in United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, and Webb v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497, opinions filed March 3, 1919, sustained the constitutionality of this section. The identical questions now involved in this case were before the Supreme Court in those cases. In the Webb Case, which came before the court on certificate from the United States Circuit Court of Appeals for the Sixth Circuit, the following questions of law were certified:

(1) "Does the first sentence of section 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor, and who cannot obtain an order blank, because not of the class to which such blanks are allowed to be issued?"

(2) "If the answer to question 1 is in the affirmative, does this construction make unconstitutional the prohibition of such sale?"

(3) "If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of section 2?"

The court answered the first in the affirmative and the second and third in the negative. This disposes of this contention of the defendant.

There are a large number of assignments of error, but most of them are to the refusal of the court to give certain special instructions to the jury, which in effect declare the section of the act involved unconstitutional, and therefore need not be considered in this opinion.

[2] One of the grounds assigned in the demurrer was that the act does not make it an offense for a registered physician to sell the narcotics described in the act under any circumstances. Section 2 of the act clearly covers offenses charged in these counts of the indictment. It reads:

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

And then it excepts, among others, a physician duly registered, under the act, "in the course of his professional practice."

In the Doremus Case the defendant was charged, as in the instant case, with being a registered physician and had sold a quantity of heroin without a written order on a blank form issued for that purpose. A copy of the indictment in that case will be found in 246 Fed. 958. The Supreme Court, after quoting the act, held:

"It is made unlawful for any person to obtain the drugs by means of the order forms for any purpose other than the use, sale or distribution thereof

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by him in the conduct of a lawful business in said drugs, or the legitimate practice of his profession.

"It is apparent that the section makes sales of these drugs unlawful except to persons who have the order forms issued by the Commissioner of Internal Revenue, and the order is required to be preserved for two years in such way as to be readily accessible to official inspection. But it is not to apply (a) to physicians, etc., dispensing and distributing the drug to patients in the course of professional practice, the physician to keep a record thereof, except in the case of personal attendance upon a patient; and (b) to the sale, dispensing, or distributing of the drugs by a dealer upon a prescription issued by a physician, etc., registered under the act."

There was no error in overruling the demurrer on this ground.

[3, 4] It is assigned as error that physicians were permitted to testify as experts as to the well-recognized methods among the medical fraternity of treating persons addicted to the use of narcotic drugs for the purpose of curing them of the habit. The ground upon which the objection is based, as stated by counsel for defendant in his brief, is:

"It was incompetent and prejudicial, for that it tended to raise an issue, even on the erroneous theory on which the case was tried, as to whether or not the plaintiff in error was practicing his profession in a legitimate manner and in good faith, while dispensing the drugs to those who, the evidence shows, admittedly applied to him for treatment as a physician."

That such evidence is admissible was decided by this court in Samuels v. United States, 232 Fed. 536, 542, 146 C. C. A. 494, Ann. Cas. 1917A, 711. See 3 Chamberlayne on Evidence, § 2425. Such evidence is not conclusive, but, as stated by the learned trial judge in his charge to the jury:

"It is competent for medical men to give in evidence their expert medical opinion touching matters within the range of the medical science with which they are familiar; but such expert medical opinion and evidence is not binding upon the jury, and is received as advisory only. The jury is therefore permitted to regard such evidence as advisory, and reckon with it in the light and experience in human affairs, and to accept it or reject it in whole or in part, as you may see fit."

Counsel rely on School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, and Bruce v. United States, 202 Fed. 98, 120 C. C. A. 370, decided by this court. In the last-cited case, evidence of similar nature was introduced against objections, but the cause was not reversed upon that ground. It was the refusal of the court to charge the jury as requested in behalf of the defendant, as appears from the opinion. The indictment in that case was for violation of section 215 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. § 10385]), using the mails in a scheme to defraud.

The School of Magnetic Healing Case was an action to enjoin a postmaster from enforcing an order of the Postmaster General depriving the plaintiffs from using the mails; the order alleging:

"They being engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses."

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The bill was dismissed by the trial judge on demurrer. It charged:

"That the plaintiffs, in their business, carried on and conducted, not only the treating of people afflicted with ills at their establishment, * * * but also engaged in the business of teaching and educating others in the practical science of healing, and that a large amount of their business consists of treatment by letter and advice to people throughout the United States and foreign countries; * * * that their business is founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting, and remedying thereof."

In reversing the cause the court at the very beginning of the opinion stated:

"As the case arises on demurrer, all material facts averred in the bill are of course admitted."

And thereupon the court held, quoting from the headnotes:

"Such an allegation having been made in a bill of complaint, the business referred to cannot on demurrer be properly pronounced such a fraud within the statutes of the United States as will justify a postmaster withholding matter sent to complainants through the mail in answer to advertisements on an order issued by the Postmaster General under sections 3929 and 4041 of the Revised Statutes of the United States [Comp. St. §§ 7411, 7573], and section 4 of an act approved March 2, 1895, 28 Stat. 963, 964, c. 191; but in overruling the demurrer this court does not mean to preclude the defendant from showing on the trial, if he can, that the business of the complainants, as in fact conducted, amounts to a violation of such statutes.

"The statutes referred to were not intended to cover any case which the Postmaster General might regard as based on false opinions, but only cases of actual fraud in fact, in regard to which opinions formed no basis."

Neither of these cases is applicable to the facts in this cause. The good faith of the defendant treating these persons as a physician, for the purpose of curing them from the narcotic habit, is the main and only issue involved in this case.

The object of the act, although enacted under the taxing power of Congress, was no doubt intended to prevent the growing use of these narcotics, deemed a menace to the nation by Congress. In the language of Mr. Justice Holmes, in United States v. Jin Fuey Moy, 241 U. S. 394, 402, 36 Sup. Ct. 658, 659 (60 L. Ed. 1061, Ann. Cas. 1917D, 854):

"It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."

In United States v. Doremus, it was held:

"The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue"—citing, among other cases, Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 535, 541, 19 L. Ed. 482; In re Kollock, 165 U. S. 526, 536, 17 Sup. Ct. 444, 41 L. Ed. 813; McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.

See, also, the opinion of this court in Hughes v. United States, 253 Fed. 543, 165 C. C. A. 213.

If physicians and the others mentioned in the exceptions can sell and dispense these narcotics, regardless of the fact whether it is done

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in good faith for the relief of a patient, then the moral object of the act is entirely defeated. It certainly cannot be claimed that a physician selling these narcotics, not in good faith, for the purpose of securing a cure of one suffering from an illness, or to cure him from the morphine habit, is doing so "in the course of his professional practice only," as prescribed by the express language of the act. A proviso must be construed strictly, and it takes no case out of the enacting clause which does not fall fairly within its meaning. It carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words, as well as within the reason, thereof. United States v. Dickson, 40 U. S. (15 Pet.) 141, 165, 10 L. Ed. 689; Dollar Savings Bank v. United States, 86 U. S. (19 Wall.) 227, 22 L. Ed. 80; Leavenworth, etc., R. R. v. United States, 92 U. S. 733, 23 L. Ed. 634; Schlemmer v. Buffalo, etc., R. R. Co., 205 U. S. 1, 10, 27 Sup. Ct. 407, 51 L. Ed. 681; Boston Safe Deposit Co. v. Hudson, 68 Fed. 758, 15 C. C. A. 651; Aaron v. United States, 204 Fed. 943, 123 C. C. A. 265; Hopkins v. United States, 235 Fed. 95, 148 C. C. A. 589; United States v. Kansas City Southern Ry. Co. (D. C.) 189 Fed. 471, 476.

[5, 6] Did the court err in excluding the letter from the Commissioner of Internal Revenue to the defendant, in reply to a letter of inquiry made by the defendant? The questions submitted by the defendant stated facts materially differing from the evidence which had been introduced by the government in the case at bar, and on which it relied for a conviction. The questions were adroitly prepared by the defendant, so as to indicate good faith in the treatment of addicts applying to him for a cure.

Another ground upon which the letter was properly excluded is that it does not attempt to give any specific instructions or express the opinion of the Commissioner, except generally. The letter concludes:

"No inflexible rule can be rendered as to the amount of any of the narcotic drugs which may be prescribed, administered, or dispensed by a physician to a patient, as this is a matter which can be determined only by the needs of each and every individual patient."

The ruling of the court was clearly not prejudicial. Section 269 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. § 1246]), as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181, provides:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

[7-10] It is claimed that the evidence did not justify the submission of the issues to the jury, and that the court erred in refusing to direct a verdict of not guilty on each of the counts.

Louis M. Wood, the person to whom the morphine is charged to have been sold by the defendant in the first count, testified that he lived in Springfield, Ill., and was an addict; that he wrote to the defendant at Ferguson, Mo., who, he understood, was putting out a cure for

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addicts; thereupon the defendant mailed him a card, on which certain questions were printed, to be answered by the addict and returned to the defendant. The answers of Wood were inserted in the blanks of the card and returned by mail to the defendant. The following is a copy of the card:

"Name: Louis M. Wood. Age 33. Post office: Springfield. County: Sangamon. State: Illinois.

"State drug used: Morphine. How long used: 14 years. By mouth or Hypo. Hypo. Amount used weekly: 120 grains or 2 Btls. Amount used daily: 17 or 18 grs. Dose per day: 4.

"Are kidneys active: Not very. Give usual weight: 190. Present weight: 175."

Shortly after mailing the card the defendant sent him 120 grains of morphine, for which he was paid $10. Every week thereafter he ordered the drug by mail, and defendant sent it to him, reducing it from 2 to 4 grains weekly, until it had been reduced to 88 grains a week, when a government agent took it from him. The same course was pursued by the defendant in selling the drug to Pearl Spellman, the person he is charged with having sold to in the third count. She resided at Terre Haute, Ind., and the application for the drug was made by her through the mails, and the drug sent to her by the defendant by express.

The sales to Mrs. William Cosgrove, the person mentioned in the second count, were made in the office of the defendant at Ferguson, Mo., where she called on him for the purpose of obtaining it. The only examination he made of her condition before selling the drug was by asking her how long she had been addicted to the use of the narcotic, and by merely looking at her arm and limb where she had been using it hypodermically, and asking how much she used. She had used from 120 to 180 grains a week at one time, and had reduced to about 70 grains when she called on the defendant. He then sold her 70 grains. That was the only time he ever saw her personally, as she then returned to her home in Toledo, Ohio, where he sent her the drug every week by express, reducing it gradually to 65 grains a week. In none of the cases were the addicts required by the defendant to be confined, so as to prevent them from securing the drug elsewhere. Wood secured more of the drug from the defendant than he required, and saved some of it for future use, in case he should be unable to secure it from the defendant at a later time.

The physicians, introduced on the part of the defendant, Dr. Morris and Dr. Tyzzer, both testified—Dr. Morris, that "if morphine can be bought by the addict, no doctor would attempt to treat him by the reduction method, unless he confined him;" Dr. Tyzzer that "it is best that the patient should be confined in order to effect a cure," adding, "but if he really follows the directions, and does his part, the result would be the same," meaning that, if he would reduce the use of the narcotic as prescribed, then the result would be the same, although not confined. He also testified that, "if the person is a morphine addict, his will power is broken, and he cannot rely on his own action for any length of time." The physicians introduced by the

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government all testified to the same effect, that unless confined an addict is never cured of the habit.

A number of other witnesses testified to having purchased narcotics from the defendant, without personally attending them. He sent it to them by express, they living in other states. Objections to their testimony were made and overruled. The only objection made to the testimony of these witnesses was that they were not named in the indictment; counsel for defendant saying:

"I just want to say that we had no notice of these witnesses. Whether our point is worth anything or not, I want to get it in."

This point was not presented by counsel in this court, either in his brief or in the oral argument, and the only reference to it in the assignment of error is:

"That the court erred in receiving, over defendant's objection and exception, prejudicial and harmful evidence introduced by the United States."

We may well treat this exception as abandoned, but even if it had been properly assigned as error, and insisted on in this court, it would not be error. Such evidence is admissible for the purpose of establishing the intent and bad faith of the defendant. Allis v. United States, 155 U. S. 117, 119, 15 Sup. Ct. 36, 39 L. Ed. 91; New York Mutual Life Insurance Co. v. Armstrong, 117 U. S. 591, 598, 6 Sup. Ct. 877, 29 L. Ed. 997; Moffatt v. United States, 232 Fed. 522, 533, 146 C. C. A. 489. The court in its charge limited this testimony to the question of the good faith solely. It charged:

"Evidence was offered and admitted in the course of the trial tending to prove sales of the drug by the defendant to persons other than those mentioned in the indictment. With respect to that, the court instructs you that, even if you believe from the evidence that the accused did sell and dispense morphine sulphate to persons other than those mentioned in the indictment, not in the course of his professional practice only, you cannot convict the defendant therefor; but you may consider such other sales, if such there were, in determining the intent, or system, or knowledge on the part of the defendant in selling to the persons set out in the indictment."

All the special requests for instructions to the jury, except those which requested the court to charge that the act, so far as it applies to the defendant was unconstitutional, were included in the court's charge, except request No. 11. That request was to the effect that under the act of Congress a physician cannot be convicted for dispensing the prohibited narcotics in the treatment of a patient, whose application is made by letter, and although the physician never comes in personal contact with such patient, provided he reduced the amount on each succeeding shipment of morphine, and furnished the morphine to the person mentioned, as in treatment for a morphine habit, in the course of his professional practice only. This request is in conflict with the act. It lacks two indispensable conditions: First, that the physician furnished the drug in good faith; and, second, that he made and kept the record required by subdivision "a" of section 6287h, U. S. Comp. Stat. 1918.

The evidence shows that the defendant has obtained an extended reputation as a dispenser of morphine sulphate. Addicts from dif-

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ferent states would apply to him, and generally through the mails, and without any examination, or even seeing them, the defendant sent it to them. The slight reductions in the weekly sales were evidently merely a subterfuge for the purpose of evading the law. None of the purchasers was ever examined by him, as any reputable physician would naturally do when undertaking the treatment of a person for the purpose of effecting a cure.

Willie Brown and Mamie Nunley each purchased 120 grains weekly, although neither of them was an addict. Brown purchased it for the purpose of peddling it, and Mamie Nunley for Maude Kobein, an addict, in order to make up for the decreasing doses.

Morris Chase, who resided at Terre Haute, Ind., and whom the defendant never saw, obtained it on orders through the mails, and paid him $5 a week for the drugs sent, amounting in the aggregate to $220. His case the defendant never diagnosed. He testified that, when the doses were reduced, he ordered it through the mails in fictitious names, and obtained it in that way.

Chas. Blaker, another witness, testified that he obtained the drug from the defendant seven times, and about half a dozen times he obtained it by sending others for it.

It was also shown in evidence that from February 7, 1916, to October 24, 1916, defendant purchased 270,000 grains of morphine, close to 630 ounces. A number of other witnesses testified to purchases in the same manner, as those of whose testimony extracts have been made. Among them was Jack Barrett, who testified he obtained morphine from the defendant. He obtained it by writing to him from Terre Haute, without ever having been seen by him.

The evidence fails to show that a charge for professional services was ever made by the defendant, only the exorbitant price for the drug was collected.

A careful reading of the testimony convinces beyond a doubt that the defendant, under the cloak of a practicing physician, sold narcotics, and not in the regular practice of his profession, for the purpose of curing addicts, and it was the duty of the court to submit the issues of fact to the jury, whose finding is conclusive in this court. As we find no prejudicial error, the judgment is affirmed.

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(258 Fed. 205)

TODD et al. v. LIPPINCOTT et al.*

(Circuit Court of Appeals, Third Circuit. May 29, 1919.)

No. 2456.

RECEIVERS ⟸157—PAYMENT OF DIVIDENDS TO CREDITORS—DISCRETION OF COURT.

Receivers of an insolvent corporation, who brought it to a state of solvency and its business to such condition that it could shortly pay all its debts, secured and unsecured, from its earnings, *held* properly permitted to pay a dividend to unsecured creditors, to the exclusion of the holders of mortgage bonds on which interest was being paid as it accrued, and which were in litigation as to the question of their maturity because of prior defaults.

Appeal from the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

Suit in equity between M. Hampton Todd and Walter Wood, receivers of R. D. Wood & Co., and Heulings Lippincott and Alfred J. Major, receivers for Camden Iron Works. The receivers for the Wood Company appeal from an order authorizing receivers for the Iron Works to pay a dividend. Affirmed.

J. H. Brinton and William F. Norris, both of Philadelphia, Pa., for appellants.

Henry P. Brown, of Philadelphia, Pa., and J. H. Gaskill, of Camden, N. J., for appellees.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and DICKINSON, District Judge.

WOOLLEY, Circuit Judge. This is one of many controversies growing out of the insolvency and complicated relations of R. D. Wood & Company, a partnership, and Florence Iron Works and Camden Iron Works, corporations, disclosed in some measure by the opinion of this court in Wood v. Todd, 251 Fed. 530, 163 C. C. A. 524. The matter now before us had its rise in a petition by the receivers of Camden Iron Works to the District Court for authority to pay a dividend of thirty per cent. on the principal and interest of the corporation's unsecured debts and on a bill in equity filed in opposition by the receivers of R. D. Wood & Company, praying, first, that the holders of mortgage bonds of Camden Iron Works be allowed to share proportionately with the general creditors in the proposed dividend; and second, that the holders of said mortgage bonds be paid additionally a sum equivalent to the amount of a dividend previously paid the general creditors; or, in default of such payments, that cash in the hands of the receivers, equivalent in amount to the dividends paid and to be paid general creditors, be set aside for the protection of the said mortgage creditors. The District Court entered a decree dismissing the bill of the receivers of R. D. Wood & Company and granted the petition of the receivers of Camden Iron Works. From this decree, the receivers of R. D. Wood & Company appealed.

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*Certiorari denied 250 U. S. 672, 40 Sup. Ct. 12, 64 L. Ed. —.

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The question on this appeal, as framed by the appellants, is:

"Where receivers are operating an insolvent corporation, may dividends be declared and paid to unsecured creditors to the exclusion of holders of bonds secured by a mortgage on the plant so operated, where foreclosure is not allowed and the insufficiency of the collateral is held to be immaterial?"

If this were an accurate statement of the question here involved, it would be impossible to escape the application of the law declared in Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640, and Hitner v. Diamond State Steel Co. (C. C.) 176 Fed. 384, cited and insistently relied upon by the appellants. This law, in effect is, that in a suit in equity brought for the purpose of administering the affairs, paying the debts and distributing the assets of an insolvent corporation, through a receivership, the distribution of such assets shall be pro rata among the creditors, subject to established liens, preferences and priorities, in determining which, a secured creditor may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom, provided, of course, that dividends must cease when the claim has been paid in full.

The real question in this case can best be understood—and the applicable rule of law be found—from a statement of the facts and circumstances out of which the question arose. They are these:

The firm of R. D. Wood & Company practically owned and actually operated Camden Iron Works, acting as its financial, purchasing, and selling agent for many years in the manufacture of iron and steel products. Of the 8,000 shares of preferred stock of Camden Iron Works, the firm and its partners owned 7,559 shares; of the 7,000 shares of common stock they owned 5,517 shares; and out of the corporation's issue of $750,000 bonds secured by mortgage, the firm held $660,000; and of its general debts the firm was a creditor for more than $400,000.

Because of occurrences which have nothing to do with the present controversy, the three concerns in 1914 became wholly insolvent and passed into the hands of receivers.

From insolvency in 1914, the firm of R. D. Wood & Company has today become solvent. The only pertinency of this fact to the present controversy is, that the payment or withholding of dividends on the indebtedness of the mortgage bonds of the Camden Iron Works will not affect the payment of the debts of R. D. Wood & Company to its creditors; it will affect only the payment of profits to the surviving member of that firm and to the personal representative of the deceased member.

From insolvency that appeared hopeless in 1914, Camden Iron Works has grown to affluence. This has been due to excellence of business management on the part of the receivers which is little short of remarkable, and also to a close and intelligent co-operation between the receivers and the court that is highly creditable to both.

Heulings Lippincott was first appointed sole receiver of Camden Iron Works, with authority to conduct the business. The funds in hand

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were entirely inadequate. By able financiering, the receiver obtained money with which to resume operation. Alfred J. Major later was appointed co-receiver. Under their joint management, the business changed immediately from steady losses to mounting profits. During their incumbency, the receivers did a business of more than $10,000,000 and disbursed more than $9,000,000. They paid the bondholders $95,000 interest in arrears and maintained interest payments as they matured in sums aggregating $112,500. In June 1918, they paid a dividend of thirty per cent. on unsecured debts and thirty per cent. on interest that had accrued thereon, and now ask authority to pay a like dividend. These payments of interest and dividends were made possible by profits earned during the receivership in the large amount of $1,094,719.60.

The obligations of the estate as they stand today are, in round numbers, $750,000 first mortgage bonds, of which the receivers of R. D. Wood & Company hold $660,000; $52,000 other mortgages; and about $600,000 general claims, of which the receivers of R. D. Wood & Company have filed about $329,000. To meet these obligations, secured and unsecured, the receivers have current assets of cash, bills and accounts receivable, etc., amounting to $1,530,970, and current liabilities amounting to $153,827, leaving net assets of $1,377,142, to which is to be added the plant and its equipment at its appraisal in October 1914, of $1,356,431. It thus appears that the current assets are alone nearly sufficient to pay all debts of the receivership, secured and unsecured, and that current assets and the plant at its appraised figure would, if need be, pay the same twice over.

In the matter of business as distinguished from finances, it appears that the receivers have unfinished contracts presently in hand which amount to more than $1,000,000, with enough coal and iron in stock and paid for to cover the contracts.

This statement of the affairs of the receivership is made somewhat in detail for the purpose of showing that the condition of insolvency of Camden Iron Works, which brought about the receivership, has disappeared, and that the proposed dividend does not involve the liquidation of an insolvent corporation and the distribution of its capital assets, but concerns merely the distribution of earnings of the receivership which exceed its business requirements, a situation to which the law of the cases cited and previously adverted to is in no sense applicable.

If the distribution to be made by the proposed dividend is out of the ordinary, as the appellants believe, it is because the earnings out of which the dividend is to be paid are extraordinary, and because it is justified by the history of the receivership and by the relation which the different creditors, secured and unsecured, bear to the corporation and to one another. R. D. Wood & Company, the principal secured creditor, owns four-fifths of the stock of Camden Iron Works, and holds six-sevenths of its mortgage indebtedness and three-sixths of its general indebtedness. With respect to the mortgage indebtedness, there are two questions yet to be determined. The first is, whether the original default in interest on the bonds prior to receivership brought

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about the maturity of those obligations, and, if so, whether the situation was changed by the subsequent acceptance by the bondholders of all interest which was in arrear and which latterly was paid on interest dates. The second is, whether the bond issue is valid in amount, it being claimed that the security of $660,000 in bonds taken and held by R. D. Wood & Company was in excess of the indebtedness of Camden Iron Works to R. D. Wood & Company at the time the mortgage was made.

It would be inequitable to make general creditors await the determination of these questions before receiving dividends, when, manifestly, payment of the mortgage bonds in full cannot be made until these questions are determined, and when the payment of the proposed dividend would in no sense deplete the mortgage security.

Both concerns now being solvent, there is no question between general creditors of R. D. Wood & Company and general creditors of Camden Iron Works with respect to the payment of their debts. The question is simply this: Whether R. D. Wood & Company and members of the Wood family composing the firm, as holders of mortgage bonds of Camden Iron Works, which are in litigation as to their maturity and amount and which are abundantly protected not only by their original security but by an increase of assets derived from the administration of the receivership, shall now be paid a dividend from earnings produced largely on credits extended by others at their instance. As no contractual rights arising from the bond obligations are violated and no security of the bondholders is prejudiced by the payment of the proposed dividend to general creditors, we are not disposed to disturb this one of the many orders which the District Court has been called upon to make in the admirable administration of this estate.

The decree below is affirmed.

(258 Fed. 208)

In re HELLER, HIRSH & CO.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 186.

INTERNAL REVENUE ⇐7—INCOME TAXES—LIABILITY OF TRUSTEE IN BANKRUPTCY.

A trustee of a bankrupt corporation, who is not carrying on its business, but has received funds as a result of a compromise made by him with a foreign corporation of a claim for nonpayment of salary and commissions, is not liable to pay an income tax under Act Sept. 8, 1916, § 13(c), being Comp. St. § 6336m, since under such section only net income earned by a trustee while operating the business of a bankrupt corporation is taxable.

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of Heller, Hirsh & Co., a corporation, bankrupt. A petition by the United States attorney for an order directing the trus-

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tee of the bankrupt to pay to the collector of internal revenue for the Second district of New York $2,400 as taxes on income under Act Sept. 8, 1916, as a preferred claim, was denied, and the government appeals. Affirmed.

Francis G. Caffey, U. S. Atty., of New York City (Ben A. Matthews and Vincent H. Rothwell, Asst. U. S. Attys., both of New York City, of counsel), for collector of internal revenue.

Rushmore, Bisbee & Stern, of New York City (Abraham Freedman, of New York City, of counsel), for trustee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. The United States attorney filed a petition for an order directing the trustee of the bankrupt corporation to pay to the collector of internal revenue for the Second district of New York the sum of $2,400 under Act Sept. 8, 1916, c. 463, 39 Stat. 756, as taxes upon income for the year 1916, as a preferred claim. The trustee was not carrying on the business of the bankrupt, and the funds said to constitute net income were the result of a compromise made by him with a foreign corporation of a claim for nonpayment of salary and commissions by the foreign corporation to the bankrupt corporation as its agents between the years 1910 and 1914. The referee, John J. Townsend, Esq., recommended that the prayer of the petition be denied, and his report, which is set out below, was confirmed without opinion by Judge Hough. We are quite clear that under section 13(c) of the act of 1916 (Comp. St. § 6336m) only net income earned by a trustee while operating the business of a bankrupt corporation is taxable.

The order is affirmed.

NOTE.—Referee Townsend's opinion, referred to in the opinion, here follows:

"Instead of making an order as referee on the present motion, I deem it more convenient to report to the judges the order I recommend should be made by them.

"On June 19, 1917, the United States attorney for the Southern district of New York filed with the referee the accompanying petition and notice of motion asking for an order directing Francis L. Kohlman, the trustee in bankruptcy of the bankrupt corporation, to pay to the collector of internal revenue for the Second district of New York the sum of $2,400 as a preferred claim against the estate of the said bankrupt corporation and against the said trustee in bankruptcy.

"The motion papers present the claim as an income tax for the year 1916, due and owing the United States of America by the trustee in bankruptcy; the tax being alleged to have accrued upon the income received by the trustee in bankruptcy during the year 1916, under the provisions of the act of Congress approved September 8, 1916. On June 19, 1917, the trustee in bankruptcy filed with the referee his affidavit denying any liability for the claim.

"On November 15, 1917, the parties filed with the referee the accompanying stipulation setting out the facts. This stipulation should be read at this point of my report. Among other facts set out in the stipulation the following appear:

"On April 23, 1915, the corporation (which had been engaged in business as a broker and dealer in fertilizing material) was adjudged a bankrupt after a petition in bankruptcy had been filed against the corporation (paragraph 2). At such date the bankrupt corporation was the owner of a claim or chose in

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action against an association organized under the laws of the empire of Germany, known as the Kalliwerke-Solstedt, which claim, amounting to $396,973.44 (for commission and salary), had accrued in the year 1914 and in prior years (paragraphs 3 and 4). On July 27, 1916, this claim, with certain claims against the International Agricultural Corporation, were compromised by the payment to the trustee in bankruptcy of $119,275 (paragraph 6). Paragraphs 8, 9, and 10 set out certain deductions with which the trustee in bankruptcy deems himself entitled to be credited, if it be determined that he is a taxable party. Paragraph 12 sets out certain deductions with which the trustee in bankruptcy claims that the bankrupt corporation is entitled to be credited, if the fund collected be regarded as deferred income of the bankrupt corporation for the years 1910 to 1914, both inclusive. Paragraph 13 sets out that during the years 1912 to 1915, inclusive, the corporation sustained losses in its business in excess of the amount of its gross profits.

"The view I take of the case renders the facts set out in the stipulation, in my opinion, in large part immaterial. The basis of the claim of the government is tabulated in paragraph 9 of the stipulation; the government in its brief claiming the balance of $26,789.41 to be net taxable income upon which the government claims an income tax against the trustee in bankruptcy for the year 1916. The claim is advanced by the government under the act of September 8, 1916. This act superseded the prior act of October 3, 1913 (38 Stat. 114, c. 16). Sections II, A, B, C, D, E, F, G.

"Carefully prepared briefs have been filed with the Referee by the parties. I find in the briefs no decisions which I deem decisive of the present motion, viz. no decisions where the government asserts a claim for an income tax against a trustee in bankruptcy of a corporation or individual adjudicated a bankrupt and therefore presumably insolvent. I refer below to certain decisions which in my opinion aid in deciding the present motion.

"In my opinion the present motion depends for its determination upon a judicial interpretation of the act of September 8, 1916, a copy of which act accompanies this report. Such interpretation should be a fair one. It is not the duty of this court or of the government authorities to resort to Procrustean methods of interpretation against the taxpayer.

"I find nothing in the act of September 8, 1916, to indicate that Congress intended to impose an income tax upon a trustee in bankruptcy in respect to the assets of a bankrupt corporation which he has taken over to be marshaled and distributed among the creditors of the corporation. To my mind the text of the act of September 8, 1916, does not indicate any such purpose. This view of the act does not deprive the government of its just due. The dividends declared and distributed to the creditors are presumptively income in the hands of the latter subject to an income tax to be assessed against the latter.

"Part I of the act of September 8, 1916 (Comp. St. § 6336a–6336lll), deals with the income tax on individuals: Section 1 (Comp. St. § 6336a) provides for a tax on 'the entire net income' of the individual. Section 5 and section 6 (Comp. St. §§ 6336e, 6336f) provide for certain deductions before the amount of the 'net income' is determined. Section 2(b) and 8(c) (Comp. St. §§ 6336b, 6336h) contemplate cases where the corpus of the individual's property (both after his death or during his lifetime) is in the possession of and the income received by persons acting in a fiduciary capacity.

"There is not the slightest suggestion in part I of the statute either that Congress intended to impose an income tax upon an insolvent individual liquidating his own estate or upon the liquidator of an insolvent individual's estate, nor is there any suggestion that it entered into the mind of Congress that such insolvent individual or his liquidator should be regarded as having a 'net income.'

"Such being my conclusion with respect to individuals dealt with in part I of the act, I pass to part II of the act (Comp. St. §§ 6336j–6336n), dealing with the income tax on corporations. I find nothing in part II to indicate that Congress intended to apply a different rule in the case of corporations from that enacted in the case of individuals. Section 10 (Comp. St. § 6336j) imposes an income tax upon the 'total net income' received by a corporation. Section 12

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(a), being section 6336*l*, Comp. St., provides for certain deductions before such 'net income' is ascertained.

"Great stress is laid by the government on the provisions of section 13(c) of the act of September 8, 1916. The presence of subdivision (c) in the act of September 8, 1916, and its absence from the prior act of October 3, 1913, has to my mind no significance in the present case in view of the peculiar language of subdivision (c).

"The language used in subdivision (c) shows that the subdivision was not intended by Congress to apply in the case of receivers or trustees in bankruptcy or assignees who merely marshaled and distributed the assets of an insolvent corporation among its creditors. In terms subdivision (c) applies only in cases where receivers or trustees in bankruptcy or assignees 'are operating the property or business of corporations' and thus may be in the receipt of a 'net income' as defined in the prior sections of the act. I regard the quoted words as of marked significance.

"To my mind the subdivision was inserted in the act to meet the specified case of the profitable operation of the business of a corporation by the officers mentioned; for instance, the operation of the business of a railroad corporation by receivers or the operation of the business of a manufacturing corporation by a trustee in bankruptcy, etc.

"In either of such cases it is quite possible that the operation of the business might result in a net income, a result which Congress sought very properly to reach. See Scott v. Western Pacific R. R. Co., 246 Fed. 545, 548, 158 C. C. A. 515 (C. C. A. 9th Circuit, 1917). I repeat my conviction that in enacting subdivision (c) Congress had in mind the definite case so aptly described by the language used, and not the case of the officers mentioned when acting merely as liquidators.

"The decisions rendered in this circuit, where receivers were engaged in operating the business of street railroad corporations, give some support to the view I have expressed, although the cases arose under the so-called United States Corporation Tax Law of August 5, 1909, c. 6, 36 Stat. 112, and not under the Income Tax Acts of October 3, 1913, or September 8, 1916.

"It has been held that the Corporation Tax Law of 1909 imposed an excise tax upon the business of a corporation in a sum equivalent to 1 per cent. upon the 'entire net income' of a corporation above $5,000. It is to be noted that whether the tax imposed be termed an excise tax or a direct income tax, its imposition depended upon the existence of a 'net income.'

"The United States district attorney applied to the Circuit Court to compel the receivers of the Metropolitan Street Railway Company and the receiver of the Third Avenue Railroad Company to file returns for those corporations for the years 1909 and 1910.

"The Circuit Judge (Pennsylvania Steel Co. v. New York City Railway Co. [D. C.] 193 Fed. 286) held (bottom of page 287) that the statute was not intended to impose a tax upon the income realized from the assets of a bankrupt corporation whose property had been taken over by a court through its officers to be marshaled and distributed and that the language used did not indicate any such intent.

"This ruling, denying the application of the United States district attorney against the receivers, was affirmed by the Circuit Court of Appeals. 198 Fed. 774, 117 C. C. A. 556. The opinion states that such statutes are to be strictly construed, and that the act of 1909 (198 Fed. 775–777, 117 C. C. A. 557–559) manifested no intent to impose a tax except where a corporation is carrying on business, and not where it is insolvent and in the hands of receivers.

"The decision of the Circuit Court of Appeals was affirmed by the United States Supreme Court (United States v. Whitridge, 231 U. S. 144, 149, 34 Sup. Ct. 24, 25 [58 L. Ed. 159]), the court holding that receivers of insolvent corporations were not within 'the spirit' or 'the letter' of the act. Attention is also called to the recent decision by Hotchkiss, J., in Lathers v. Hamlin, 102 Misc. Rep. 563, 170 N. Y. Supp. 98.

"The decisions cited in the brief filed by the government, such as Edwards v. Keith, Collector, 231 Fed. 111, 145 C. C. A. 298, L. R. A. 1918A, 498 (C. C. A., 2d Circuit), and Towne v. Eisner, Collector, 245 U. S. 418, 38 Sup. Ct. 158,

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62 L. Ed. 372, L. R. A. 1918D, 254 (January, 1918), turning as they do on what is and what is not taxable income, no question arising in those cases as to the status of the taxes, are not pertinent in my view of the case before me.

"For like reason I have not discussed the correctness of the amount of net income upon which the government claims a tax. This amount, as well as his liability for any tax, is challenged by the trustee in bankruptcy.

"I am of the opinion that the trustee in bankruptcy is entitled to an order denying the prayer of the petition filed by the United States attorney for the Southern district of New York, on behalf of the collector of internal revenue for the Second district of New York."

(258 Fed. 212)

MEYER v. UNITED STATES. ASERSON v. SAME. SCHLOSS v. SAME.

(Circuit Court of Appeals, Seventh Circuit. March 15, 1919. Rehearing Denied May 6, 1919.)

Nos. 2411-2413.

1. CONSPIRACY ⟸28—CONCEALMENT OF BANKRUPT'S PROPERTY.
Insolvent debtors can be guilty of conspiracy to hide their property, so that their creditors cannot reach it through bankruptcy proceedings, which the debtors are expecting to be instituted; it not being necessary that at the time of the conspiracy the proceedings should be pending and a trustee appointed.

2. INDICTMENT AND INFORMATION ⟸117—INFERENCES AGAINST PLEADER.
The rule that inferences are to be taken against the pleader does not extend to imagining inferences that are contrary to the fair commonsense reading of the averments.

3. CONSPIRACY ⟸43(6)—INDICTMENT—INFERENCES.
In indictment for conspiracy to hide property in view of expected bankruptcy proceedings against defendants, averments that in furtherance of the conspiracy defendants turned over the check of H., belonging to them, to A., *held* not to allow inference that they lawfully turned it over.

4. CRIMINAL LAW ⟸412(3)—CONCEALMENT OF BANKRUPT'S PROPERTY—EVIDENCE—DECLARATIONS.
Statements of firm's business condition, made by partners a month before bankruptcy proceeding, *held*, on prosecution of them for conspiracy to conceal assets from the trustee, in connection with proof of relatively small amount of property found by trustee, to be material circumstances in relation to the concealing of firm's assets, and admissible as declarations against partners making them.

5. CRIMINAL LAW ⟸681(1)—ADMISSION OF EVIDENCE—SUBSEQUENT EVIDENCE.
Value of exception to receiving in evidence, on prosecution for conspiracy to conceal assets from trustee in bankruptcy, telegrams purporting to be signed by defendants and addressed to S. at D., without proof that defendants or either of them had authorized their transmission, was destroyed when S. thereafter testified that he received and answered the messages, and that in response to his answer one of defendants came to D. on the matter to which the messages related.

6. CRIMINAL LAW ⟸1186(4)—REVERSIBLE ERROR—STATEMENT OF PROSECUTING ATTORNEY.
Any misconduct of prosecuting attorney in making statement in argument, as matter of personal belief apart from the evidence, of there being no doubt of defendants' guilt, will not cause reversal; the record furnishing clear demonstration of guilt.

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7. INDICTMENT AND INFORMATION ⊜119—SURPLUSAGE.
The unessential quoted words of an indictment, that the three defendants had conspired "with other persons to the grand jury unknown," may be ignored; there being no evidence of there having been more than the three conspirators.

8. CRIMINAL LAW ⊜814(3)—INSTRUCTIONS—REQUEST INAPPLICABLE TO ISSUE.
Requested instruction, though stating a correct principle, is properly rejected, where there is no evidence to which it is applicable, as giving it would only becloud the issue.

9. CRIMINAL LAW ⊜815(4)—INSTRUCTIONS—REQUESTS—IGNORING PART OF EVIDENCE.
Requested instruction, on prosecution for conspiracy to conceal assets from trustee in bankruptcy, that if defendants, in anticipation of bankruptcy, had agreed to make absolute transfers of some of their property, they could not be found guilty, though such transfers would be voidable preferences, was bad, as requiring an acquittal if transfers of "some" of their property were preferential only, in spite of clear evidence of concealment of other assets.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Gustave A. Meyer, Hyman N. Aserson, and Morris F. Schloss were convicted of conspiracy to conceal assets from a trustee in bankruptcy, and bring error. Affirmed.

Benjamin C. Bachrach and James H. Wilkerson, both of Chicago, Ill., for plaintiffs in error.

Charles F. Clyne and John H. Lally, both of Chicago, Ill., for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Plaintiffs in error were convicted of conspiracy to conceal assets from a trustee in bankruptcy.

Assignments of error challenge the indictment, the sufficiency of the evidence, the admission of evidence, the district attorney's argument to the jury, and the court's charge.

The indictment charged that plaintiffs in error expected that an involuntary petition in bankruptcy would be filed against them, and that adjudication of bankruptcy and appointment of a trustee would follow; that in anticipation of such proceedings they conspired to conceal from said trustee certain property which should belong at the time of such concealment to the bankruptcy estate, including, among many items, a certain check signed by one Morton Hill for $532.64; and that in pursuance and in furtherance of said conspiracy they turned over to one May Aserson a certain check signed by one Morton Hill for $532.64.

[1] One line of objections is based on the failure of the indictment to charge that the conspiracy included an intention on the part of plaintiffs in error to be thrown into bankruptcy and have a trustee appointed, or to charge that at the time of the conspiracy proceedings were pending and that a trustee had been appointed. These objections proceed on the erroneous theory that insolvent debtors cannot

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properly be convicted of a conspiracy to hide their property, so that their creditors cannot reach it through bankruptcy proceedings which the debtors are expecting to be instituted.

[2, 3] Another contention is that the indictment does not show that the overt act was done to effect the object of the conspiracy. Invoking the rule that inferences are to be taken against the pleader, plaintiffs in error insist that we shall infer that they lawfully turned over the Morton Hill check to May Aserson. But the rule does not extend to imagining inferences that are contrary to the fair common-sense reading of the averments. The conspiracy is fully and clearly stated. It included the purpose to conceal the Morton Hill check, "which should belong at the time of such concealment to the bankruptcy estate." In charging the overt act the pleader averred that in furtherance of said conspiracy the plaintiffs in error turned over the Morton Hill check to May Aserson. This averment, taken in connection with the statement of the nature and scope of the conspiracy, makes it impossible to infer that the check was not the property of the bankrupts after it was turned over to May Aserson. And it is obvious that putting one's property in the possession of another may be an effective step towards concealing it from creditors. Many other overt acts are alleged, but the objection to them is precisely the same.

The evidence abundantly sustains the verdict. Among other things, the bankrupts shipped goods out of the state on pretended sales after the bankruptcy court had entered a restraining order against them. As to the formation of the conspiracy, though the evidence, as usual, is wholly circumstantial, it fully warrants the jury's finding.

[4] Schloss and Aserson were partners in a mercantile business. Meyer was their credit man. Over their objection evidence was admitted of statements of the business condition of Schloss & Aserson made by them a month before the petition in bankruptcy was filed. These property statements had no bearing on the question of conspiracy. In fact they were made before any conspiracy was formed; but, in connection with the proof of the relatively small amount of property found by the receiver and the trustee, they were material circumstances in relation to the concealing of the firm's assets. Against Schloss and Aserson they were admissible as declarations; and the court's charge to the jury excluded this evidence from operating against Meyer.

[5] Certain telegrams purporting to be signed by Schloss & Aserson, and addressed to one Siderman at Detroit, were identified by a Western Union agent as having been transmitted, and were then admitted in evidence, without any proof that Schloss & Aserson, or either of them, had authorized the transmission. But the value of the exception then taken was destroyed when Siderman subsequently testified that he had received the messages and had answered them, and that Aserson in response to his answer had gone to Detroit on the matter to which the messages related.

[6] In his closing address to the jury the district attorney said:

"Just one word more. Counsel has told you of an obligation that he has. I want to say that my obligation as a government official is to protect de-

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fendants as well as to protect the rights of the government. Were there a doubt as to the guilt of these defendants, I would ask that the indictment be nollied."

Plaintiffs in error objected. The bill of exceptions does not contain what their counsel said respecting his official obligation. But the court, evidently having that statement in mind, remarked:

"I think the district attorney must have some latitude of that sort. It is his duty to do right toward the defendants as well as toward the government."

Exception was taken to the court's refusal to reprove the district attorney and admonish the jury. The reference to the district attorney's duty is true. But not every truth is relevant to the issue. His statement respecting there being no doubt of the defendants' guilt would be quite proper if the full context should show that it was the summation of his argument on the evidence, and not the expression of his personal belief apart from the evidence. But if we should grant that the small portion preserved in the bill of exceptions reaches the range of misconduct, we should still decline to reverse on this record which furnishes a clear demonstration of guilt. In a closely balanced case, even slight misconduct of counsel might require reversal.

[7] Many exceptions are predicated on the court's refusal to give written instructions tendered by counsel for plaintiffs in error. On this subject the court said:

"No, I don't think it is proper that you should read anything to me. My duty is to charge orally and counsel's to except orally."

After this position was taken by the court, and after the court had stated that he had intended to give in his oral charge the gist of all the requested instructions, except two on behalf of Aserson, no exceptions were taken by Schloss and Meyer, and none by Aserson, save as to the two which were explicitly refused. As an addendum suggested by Aserson, the court charged:

"You cannot find one man guilty and two not guilty under the testimony."

And Schloss and Meyer each excepted.

Against this addendum the objection is urged that the indictment charged that the three defendants had conspired "with other persons to the grand jury unknown." As there was no evidence tending to prove that there were more than the three conspirators, the court's statement was correct in fact. If it was erroneous in law, it would be because the law would defeat the whole case for the government's failure to prove the above-quoted portion of the indictment. But the statute, not the drafter of the indictment, measures the law. If the pleader omits an essential element, the case fails because the pleader cannot shorten the law. If he includes all the essential elements and more, again the pleader cannot enlarge the law, and the case will be sustained and the law vindicated by ignoring the unessential allegations. U. S. v. Vickery, Fed. Cas. No. 16,619; Wilson v. U. S., 190 Fed. 427, 111 C. C. A. 231.

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[8] One of Aserson's rejected requests stated that, inasmuch as the indictment charged a conspiracy in anticipation of bankruptcy proceedings, a verdict of guilty could not be based on proof of a conspiracy which was not entered into until after bankruptcy proceedings had been instituted. Correct; but there was no evidence to which it was applicable and the giving of it would only have beclouded the issue.

[9] Aserson's other rejected request was that, if the jury should find that the defendants, in anticipation of bankruptcy, had agreed among themselves to make transfers of some of their property, and that said transfers were to be absolute, and that the defendants were not to conceal the proceeds of the property so transferred, the jury could not find the defendants guilty, even though such transfers would constitute voidable preferences. As the evidence showed some matters that might be only preferences, and not concealments of assets, it would have been error to refuse to give a proper instruction on this subject. But Aserson wanted the court to charge that, if transfers of some of their property were preferential only, the jury could not convict in spite of clear evidence of concealment of other assets.

The judgment in each case is affirmed.

(258 Fed. 216)

MILLER v. WILLIAMS.

(Circuit Court of Appeals, Fourth Circuit. April 1, 1919.)

No. 1667.

1. JUDGMENT ⟸472—JUDGMENT OF FEDERAL COURT—COLLATERAL ATTACK.
A judgment of a federal District Court having jurisdiction of the subject-matter, the parties thereto being in fact citizens of different states, which has not been challenged by appeal or writ of error, is binding upon the parties and their privies until reversed or otherwise set aside, and is not open to collateral attack.

2. REMOVAL OF CAUSES ⟸116—FEDERAL COURT—EQUITY JURISDICTION—CANCELLATION OF RELEASE—ATTACHMENT.
Where a judgment at law, rendered by the federal District Court in West Virginia, was assigned to plaintiff's testator, and by plaintiff released through fraudulent misrepresentations, the release may be canceled in a suit brought in the state court of Virginia, sitting as a court of equity, and real estate may be attached to satisfy the judgment, and removal of such suit for cancellation and enforcement to the federal court by defendant therein does not deprive plaintiff of her rights, under Code Va. 1904, § 2964, providing that, when a person has a claim, legal or equitable, exceeding $20, he may have a bill in equity for an attachment to secure and enforce it.

3. JURY ⟸16(1)—RIGHT TO JURY TRIAL—CANCELLATION OF FRAUDULENT RELEASE OF JUDGMENT.
In setting aside a fraudulent release of its own judgment, a law court is exercising equitable power, founded on its control of its own records or of its own processes, and a jury trial may not be demanded as of right.

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Bill by Lucy Henry Williams, executrix of the estate of R. R. Henry, deceased, against R. B. Miller, which was removed from the state court. Decree for plaintiff, and defendant appeals. Affirmed.

John Kee, of Bluefield, W. Va. (Joseph M. Sanders and Russell S. Ritz, both of Bluefield, W. Va., on the brief), for appellant.

James S. Kahle, of Bluefield, W. Va., and S. W. Williams, of Roanoke, Va. (William E. Ross, of Bluefield, W. Va., on the brief), for appellee.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

KNAPP, Circuit Judge. The facts which gave rise to this litigation are set forth in our opinion in the kindred case of Ross v. Miller, 252 Fed. 697, 164 C. C. A. 537, and need not be repeated. This is the equity action therein mentioned as begun in the circuit court of Bland county, Va., in July, 1917, and removed by defendant, because of nonresidence, to the United States District Court for the Western District of Virginia. The suit was brought to subject certain real estate of defendant to the payment of a judgment recovered against him in 1915, in the United States District Court for the Southern District of West Virginia, and to cancel a release of that judgment on the ground that it had been procured by fraud. The real estate in question was attached, under provisions of the Virginia Code, when the suit was commenced in the state court. After removal to the court below, the defendant moved to dismiss the bill for want of equity, and because "this court has no jurisdiction to set aside a release and discharge entered of record of the judgment of another court." The motion was denied (249 Fed. 495), the case tried, and a decree entered substantially as prayed for by the plaintiff. Defendant appeals.

[1] 1. It is argued that the judgment sought to be enforced is void, for the reason that the pleadings in the suit in which it was recovered do not show the requisite diversity of citizenship to give the court jurisdiction. The contention must be rejected. There is no question that the court had jurisdiction of the subject-matter, or that the parties were in fact citizens of different states, and the judgment has not been challenged by appeal or writ of error. It has long been settled that such a judgment is binding upon the parties and their privies until reversed or otherwise set aside, and therefore not open to collateral attack. Skillern's Executors v. May's Executors, 6 Cranch, 267, 3 L. Ed. 220; McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202.

[2] 2. It is also argued that the release could be canceled only by the court which rendered the judgment, and therefore the court below was without authority to decree its cancellation. The argument is not convincing. As above stated, the plaintiff filed a bill in equity in the state court and attached the real estate of the nonresident defendant, which was within the jurisdiction of that court, under the

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provisions of section 2964 of the Code of Virginia, which reads as follows:

"When a person has a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be payable or not, * * * if such claim exceed the sum of twenty dollars, exclusive of interest, he may, on a bill in equity filed for the purpose, have an attachment to secure and enforce the claim," etc.

Even on defendant's theory that there was no judgment against him when the suit was commenced, because plaintiff had released it, manifestly she had a claim against him for the amount of the judgment, and the Virginia statute in express terms gave her a right of action in equity to enforce that claim. The property of defendant was seized by attachment, as the statute provides, and he was personally served with process in that state. It follows that the state court, sitting as a court of equity, had full jurisdiction to grant the relief sought by plaintiff, if the proofs sustained her contention, and to that end could set aside the release and order a sale of the attached real estate to satisfy the judgment. This was the right of plaintiff in the court in which her suit was brought, and the defendant should not be permitted to take away that right by removing the case to a federal court and there setting up the plea that the cause of action stated in the bill was not cognizable by a federal court of equity. It seems but reasonable to hold that on this ground the motion to dismiss was properly denied.

[3] As to the inherent and independent power of the court below to cancel the release in question, we are satisfied to adopt the views expressed by the learned trial judge in his opinion (249 Fed. 495) as follows:

"In setting aside a fraudulent release of its own judgment, the law court is, as has been said, exercising an equitable power. The relief is usually granted on motion. A jury could not be demanded as of right on such a trial. 1 Freeman on Executions (3d Ed.) § 54; 3 Freeman, § 361, p. 2048; Wilson v. Stilwell, 14 Ohio St. 464, 468; Laughlin v. Fairbanks, 8 Mo. 367, 370; Anderson v. Carlisle, 7 How. (Miss.) 408; Morton v. Walker, 7 How. (Miss.) 554; Union Pacific R. Co. v. Syas, 246 Fed. 561, 158 C. C. A. 531. There are many powers of the law courts which have been immemorially exercised without the aid of a jury. Trials on habeas corpus, contempt, mandamus, and prohibition are such. The equitable powers of law courts over their own judgments, illustrated by orders in respect to the execution of writs of possession, are also, as I believe, always exercised without a jury. The power that the law court has to set aside a fraudulent release of its judgment is founded on its control of its own records, or control of its own processes. Because in exercising this power it administers a relief which is equitable in nature, it seems to me to follow that no jury trial of the issue could be required. If the court were to lay such issue before a jury the verdict (as on an issue out of chancery) would be advisory only. I do not contend, of course, that an issue as to the validity of a release of a judgment (especially if not under seal) might not be so presented in a court of law as to raise an issue properly to be tried by a jury. If an action at law be brought on the judgment, and the defendant pleads the release, a replication setting up fraud in procuring the release would present such an issue. But the right of the plaintiff at bar in the law court in West Virginia would be presented by motion, and would, as I believe, be properly tried by the court without a jury. If I am right in so thinking, section 723 [Rev. St. (Comp. St. § 1244)] does not seem to present any obstacle to the jurisdiction here. The most important and fundamental object of the statute was to prevent the equity courts from depriving a party

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of his constitutional right to a jury trial. As no right of jury trial would be here destroyed, and as the relief to be had in the law court is equitable, it would seem that the statute would be strained in holding it to apply here. It savors too much of technicality and mere literalness to hold that a plaintiff in equity must be sent to a law court to secure equitable relief. Such unnecessary circuity of action, delay, and expense for no legitimate purpose could hardly have been intended.

"Moreover, we have not here a case in which the remedy at law can be afforded by any law court having jurisdiction of the person or property of the releasee. There is only one law court that can cancel the release here in question. This fact, coupled with the further fact that that particular law court is in another jurisdiction, would seem to give some further weight to the assertion that the remedy at law here is not such as is within the intent of the statute. At any rate the remedy at law in this case does not seem to be as adequate as the remedy in equity; and the facts in each case must determine the question as to the adequacy of the remedy at law. * * *

"And again, if this court has jurisdiction to cancel the release, its further jurisdiction to do complete justice and enforce the attachment lien is not affected by adequacy of a remedy at law in this respect. Purely legal remedies are enforced in equity, in order to do complete justice, if there is also a right to grant equitable relief. This ground for dismissal was perhaps suggested by an erroneous belief that the plaintiff is here seeking to enforce a judgment lien. She has no judgment lien. She has a statutory lien of attachment only. If this court has an independent right to cancel the release, it has the further right to enforce this lien, and I cannot see that the existence of some other remedy at law, if it existed, could destroy this right."

3. On the merits it is enough to say that there was ample evidence to support the finding of the trial court to the effect that the release was procured by fraud, and the conclusion therefore follows that the decree should be affirmed.

(258 Fed. 219)

THE SUFFOLK.

THE BRAZOS.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

Nos. 182, 183.

1. COLLISION ⟹83—STEAMSHIPS ON CROSSING COURSES—VIOLATION OF RULES.
A collision at sea in a dense fog between two steamships on crossing courses *held* due to faults of both; one being in fault for excessive speed, and both for failure to obey the imperative requirement of article 16 of the International Rules (Comp. St. § 7854), to stop their engines on hearing the signal apparently forward of their beams.

2. COLLISION ⟹17—FAULT—PRESUMPTION FROM VIOLATION OF RULES.
A vessel which violates a statutory rule must be held in fault for a following collision, in the absence of proof that such violation did not contribute thereto.

Appeals from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by the Mallory Steamship Company, owner of the steamship Brazos, against the steamship Suffolk, the Coastwise Transportation Company, claimant, with cross-libel. Decree holding both vessels in fault, and the claimant of the Suffolk appeals. Affirmed.

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Burlingham, Veeder, Masten & Fearey, of New York City (Charles C. Burlingham and Chauncey I. Clark, both of New York City, of counsel), for Mallory S. S. Co.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass. (Edward E. Blodgett and Albert T. Gould, both of Boston, Mass., of counsel), for Coastwise Transp. Co.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. [1] January 22, 1916, about 3:30 p. m., in a dense fog, the twin-screw passenger steamer Brazos, proceeding at about 8 knots an hour, with her engines at slow, on a voyage from New York to San Juan, Porto Rico, heard the fog whistle of a steamer which proved to be the single-screw steamer Suffolk, about four points on the starboard bow.

At the same time the steamer Suffolk, bound from Newport News with a cargo of coal to Boston, proceeding with her engines at half speed, heard the whistle of the Brazos about 2 points on her port bow, whereupon she put her engines at dead slow.

At 3:34 the Suffolk heard a second and louder signal from the Brazos, still two points on her port bow, whereupon she ported two points and stopped her engines.

At 3:40 the vessels hove into sight, each having the other from three to four points on the port and starboard bows, respectively; the Suffolk heading almost at a right angle with the Brazos' starboard side.

The Brazos hard-astarboarded, put her starboard engine full speed ahead and her port engine full speed astern for the purpose of swinging away from the Suffolk, while the Suffolk blew three whistles and put her engines full speed astern. Nevertheless they came together, the bow of the Suffolk contacting with the starboard quarter of the Brazos at a point about 100 feet forward of her stern.

Judge Manton held the Brazos solely to blame for excessive speed in the fog, but subsequently, having had his attention drawn to the decision of the Supreme Court in Lie v. San Francisco & Portland Steamship Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726, then lately handed down, modified his conclusion by holding the Suffolk also at fault for failing to stop her engines on first hearing the signal of the Brazos forward of her beam, as required by article 16 of the International Regulations.

International Regulations adopted by Congress March 3, 1885 (23 Stat. 441), contained the following provision:

"Art. 13. Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow go at a moderate speed."

The International Regulations of 1890 altered this provision as follows:

"Art. 16. Every vessel shall in a fog, mist, falling snow or heavy rain storm, go at a moderate speed and having careful regard for the existing circumstances and conditions. A steam vessel hearing apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over." Act Aug. 19, 1890, c. 802, 26 Stat. 326 (Comp. St. § 7854).

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Congress, in adopting the present International Regulations of 1890, recognized that the provision of the regulations of 1885 was not sufficient, and expressly added the requirement that vessels proceeding at a moderate speed in a fog should stop their engines on hearing a signal forward of their beam.

The decision in the case of Lie v. Steamship Co., supra, conclusively determines that the duty to stop the engines is imperative, so far as the circumstances of the case admit, when a steamer proceeding at a moderate speed in a fog hears a fog signal forward of her beam. Mr. Justice Clarke said:

"The most cursory reader of this rule must see that, while the first paragraph of it gives to the navigator discretion as to what shall be 'moderate speed' in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a fog renders it not necessary to dwell upon the purpose and obvious wisdom of this second paragraph of the rule."

[2] We think it perfectly clear that the Brazos was at fault for excessive speed and that the District Judge was right in modifying his first opinion by holding the Suffolk also at fault for not stopping her engines when she heard the first signal of the Brazos ahead on her port bow. Nothing in the circumstances of the case prevented her from so doing, and in the absence of proof that the violation of the statute did not contribute to the collision, the Suffolk must be held also at fault. The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148.

It is, however, obvious that if the Suffolk had stopped her engines when she first heard the signal of the Brazos, or even when she heard the second signal, the Brazos would have passed safely across her bows.

Apart from the fault of the Suffolk in failing to conform to this general requirement of care prescribed by the statute, she had particular notice in this case that the Brazos was approaching on a course involving danger of collision. At 3:30 p. m., when going at a speed of 8 knots, she heard the first signal of the Brazos two points on her port bow and reduced to slow. At 3:34 she heard the second signal, still two points on her port bow. This showed that the Brazos was approaching without any change of bearing, indicating to a competent navigator that the vessels were on converging courses. Thereupon the Suffolk ported two points, and at 3:38 heard the third signal of the Brazos four points on the port bow, which, allowing for the Suffolk's change of course of two points to eastward, indicated that the Brazos had not altered her course, and that the vessels were still approaching on converging courses, involving danger of collision. At 3:40 the vessels hove in sight of each other, and then they were so close that, although the Brazos hard-astarboarded, and put her starboard engine ahead and her port engine astern at full speed, so as to throw her out of the way of the Suffolk, and the Suffolk blew three blasts and went full speed astern, the starboard quarter of the Brazos, about 100 feet from her stern, struck the stem of the Suffolk at 3:41.

These times, taken from the log of the Suffolk, in connection with the testimony of her master and second officer, who were both in the

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pilot house, make it perfectly apparent on her own story that when the vessels saw each other collision was unavoidable, even if she were barely moving in the water, as her witnesses say.

In the case of The Persian, 224 Fed. 441, 140 C. C. A. 135, much relied on by the appellant, the Persian heard the Millinocket's signal ahead at 12:12, and stopped her engines; at 12:14 she went full speed astern, and at 12:15 the collision happened. It will thus be seen that she complied strictly with article 16 as to stopping her engines. The fault charged against her was that she altered her course, but this we held not to have been a fault under the circumstances. In this case we have not thought it necessary to consider whether or not the Suffolk was at fault for porting two points.

Decisions in cases of collision happening before the present International Regulations of 1890 had been adopted by Congress should be read with that fact in mind.

The decree is affirmed.

(258 Fed. 222)

THE KENNEBEC.

SEABOARD & GULF S. S. CO. v. BALTIMORE DRY DOCKS & SHIP BUILDING CO.

(Circuit Court of Appeals, Fourth Circuit. April 1, 1919.)

No. 1678.

WHARVES ⊂=20(1)—DRY DOCKS—LIABILITY FOR INJURIES TO VESSELS UNDER REPAIR.

A dry dock company, employed to make repairs to the exterior of the hull of a steamship, *held* not required to furnish steam for heating the interior while the work was being done, nor liable for injury caused by freezing of the steam pipes, where the master and crew remained on board and in charge.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty by the Baltimore Dry Docks & Ship Building Company against the steamship Kennebec; the Seaboard & Gulf Steamship Company, claimant and cross-libelant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 252 Fed. 194.

Milton Roberts and Clifton S. Brown, both of Baltimore, Md. (Daniel H. Hayne, of Baltimore, Md., on the brief), for appellant.

L. Vernon Miller and George Weems Williams, both of Baltimore, Md., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The Baltimore Dry Docks & Ship Building Company, appellee here, libeled the steamship Kennebec for a repair bill of $2,988.90, and thereupon her owner filed a cross-bill for damages to the amount of some $23,000 for alleged neglect of duty, as will presently be stated, of which $4,329.65 was for direct injury

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to the machinery of the vessel and the balance in the nature of demurrage. On the trial the correctness of the repair bill was admitted, and the cause proceeded on the allegations of the cross-bill. The decree appealed from dismissed the cross-bill and gave the libelant judgment for the amount of its claim.

The steamship was taken from the plant of the W. S. Cahill Company to the dry dock of appellee in Baltimore Harbor between 5 and 6 o'clock in the afternoon of December 27, 1917, for the purpose of having some work done on her hull. Prior to this she had been discharging sulphur at the Canton ore dock, and at the same time undergoing annual inspection by the steamship inspectors. While at Canton fires were drawn to permit the Cahill Company to repair her boilers, and that company supplied heat to the vessel from an electric welding plant moored alongside. Upon completion of the discharge of cargo at Canton the ship was moved to the Cahill plant for further repairs, to enable her to pass inspection; and while there a steam line was run from the plant's boiler to her deck line for heating purposes.

The Kennebec remained in appellee's dry dock until the work which it had undertaken to do was completed, which was some time on the 30th, when she returned to the Cahill plant. During that time the weather became extremely cold, and as the vessel was without heat some of her steam pipes and other apparatus bursted from freezing, causing the damage in question. The dock company is sought to be held liable on the theory of neglect of duty to furnish sufficient steam to prevent the damage, which is claimed to have been requested by the ship's captain. The dock company denies that any such request was made, or that it was otherwise under any obligation to protect the machinery from freezing.

To this brief outline is added the following from the opinion of the court below, which we accept as a fair and correct deduction from the testimony:

"The day after the ship arrived at the dry docks it was comparatively mild, the thermometer rising to about 40 degrees. At that temperature the pipes were in no danger, but the living quarters upon an unheated ship were very uncomfortable. Accordingly, in the forenoon of that day, the captain of the ship asked the superintendent of the dry docks to furnish steam, saying, unless he had it, he feared he could not keep his crew. He now thinks he had also in mind the protection of the pipes against the possibility of a cold wave. If he had, he kept it to himself, and said nothing to the dry docks superintendent about it. It would have been quite troublesome and inconvenient for the latter at that time to have furnished steam. I doubt not that it could have been done at a price, but it did not seem worth while, for the mere purpose of retaining the crew on board, instead of sending them to a boarding house on shore. Moreover, the superintendent then supposed that the repairs to the ship could be finished in 24 hours, or thereabouts, and that elaborate arrangements for so brief a time were unnecessary and so told the captain.

"In consequence of the refusal to furnish steam an application was subsequently made to the dry docks for oil stoves for the crew's quarters. It so happened that there were none available. When the engineer of the ship learned that steam would not be furnished, he had the pipes drained, so far as that could be done without breaking connections and taking apart certain portions of the machinery. To have done everything necessary to get all the water out of the pipes would have taken, with the force he had at hand, 24 hours and perhaps more. At least that much time would have been required to have put them back so that the engines could be operated.

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"As the dry docks went on with the work, it perhaps found there was more to be done in the way of repairs than had originally been apparent, and for that or some other reason the work was not finished until December 30th. During the night of December 28th the temperature fell rapidly, and on the 29th and 30th went down nearly to zero. On the morning of the last-named day, it was discovered that the water left in the pipes and engines had frozen, and that the damage for which the ship seeks to recover by its cross-libel had been done."

It thus appears that whatever request for heat may have been made the dock company at once refused, and the captain without protest took measures accordingly. If, therefore, the dock company was under any obligation it was an obligation, not of contract, but imposed by law because of the relationship of the parties. Appellant says the law of bailment applies, and cites cases illustrating its familiar principles. But an essential element of bailment is delivery of possession to the bailee, and we think it plain that there was no such delivery in this case. The work undertaken by appellee was confined to the exterior of the hull, and had nothing to do with any other part of the vessel. The captain continued in command, and he and the crew stayed on board. In every substantial sense the ship remained in the control of her master, and the dock company certainly did nothing to interfere with that control, or to prevent him from doing whatever he thought necessary to protect the machinery of the vessel. The doctrine of ordinary care of a bailee has no application.

Moreover, it is not shown that the dry dock company was accustomed to furnish steam to vessels in its docks, or that it held itself out as prepared to furnish steam in cold weather. On the contrary, the record shows that it did so only for government vessels, when the contract for repairs contained such a provision. In short, there appears to us no aspect of the facts under which the dock company can be charged with liability for what happened to the pipes and machinery of the steamship.

The case was correctly decided by the trial court, and its decree must be affirmed.

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(258 Fed. 225)

MILLER, Internal Revenue Collector, v. GEARIN.*

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3281.

1. INTERNAL REVENUE ⟸7—INCOME TAXES—"INCOME."

Where, in 1907, the owner of land leased the same for 23 years, under an agreement requiring the tenant to construct an expensive brick building, and on the tenant's default the owner retook possession in 1916, the value of the building cannot be deemed income accruing in the year 1917, within Income Tax Law Sept. 8, 1916, § 2a (Comp. St. § 6336b), for under the lease the title to the building vested in the owner immediately upon construction, and the lessee's default caused the owner a loss.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

2. INTERNAL REVENUE ⟸7—INCOME TAXES—INCOME TAX LAW—CONSTRUCTION.

Where an income tax law is doubtful, doubts should be resolved in favor of the taxpayer against the government.

3. STATUTES ⟸245—LEVYING TAXES.

Statutes levying taxes should be construed, in case of doubt, against the government and in favor of the citizen.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action by Matilda M. Gearin against Milton A. Miller, Collector of Internal Revenue of the United States for the District of Oregon. There was a judgment for plaintiff, demurrer to the complaint having been overruled, and defendant brings error. Affirmed.

The defendant in error was the owner of a lot in the city of Portland, which was under a lease to Rothchild Bros., a corporation, which lease by its terms would expire on March 30, 1907. The rental under the lease was $1,300 per month. On October 5, 1906, the parties to that lease entered into a new lease, in pursuance of which the lessee was to destroy and remove the frame buildings which they occupied on said lot, and erect a seven-story brick building thereon at a cost of not less than $85,000. The lessee erected the building and completed the same during the year 1907 at a cost, as the lessee claimed, of $140,000. The term of the lease was 23 years from April 1, 1907, and the agreed rental was $1,200 per month for the first 21 years of the term, and $1,450 for the last 2 years, and the lessee was to pay all taxes and street and sewer assessments levied against the property. The lessee paid the rent until March 15, 1916, whereupon it made default, and in consequence thereof the defendant in error, by means of an action for forcible entry and detainer, acquired possession of the property on December 2, 1916. Since that time the rentals have been insufficient to pay the expenses of maintenance, management, and taxes. The plaintiff in error, as collector of internal revenue, assessed the defendant in error for the value of said building, which he placed at the sum of $108,653.50, as income received in the year 1916; the tax thereon being $4,872.16. The defendant in error paid that sum under protest, and appealed from said assessment to the Commissioner of Internal Revenue, and the Commissioner affirmed the action of the collector. The present action was brought by the defendant in error to recover said sum of $4,872.16. To her complaint in the court below a demurrer was interposed and overruled, and thereupon judgment was entered for the defendant in error.

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*Certiorari denied 250 U. S. 667, 40 Sup. Ct. 13, 64 L. Ed. —.

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Bert E. Haney, U. S. Atty., and John J. Beckman, Asst. U. S. Atty., both of Portland, Or., for plaintiff in error.

Hugh C. Gearin, Dolph, Mallory, Simon & Gearin, and Hall S. Lusk, all of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The question here is whether the building which was placed upon the property of the defendant in error in the year 1907 under the lease was income received in the year 1916 by reason of the fact that in that year the lease was forfeited and the defendant in error resumed possession. Section 2 (a) of the Income Tax Law of 1916 (Act Sept. 8, 1916, c. 463, 39 Stat. 757 [Comp. St. § 6336b]) provides that—

"The net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The lessor acquired nothing in 1916 save the possession of that which for many years had been her own. The possession so acquired was not income. It was not a gain, but was a loss. Assuming that the building was income derived from the use of the property, we think it clear that the time when it was "derived" was the time when the completed building was added to the real estate and enhanced its value. At that time it represented a prepayment to the lessor of a portion of the rental, distributable over a period of 23 years. The lease provided that the ownership of all buildings or improvements put upon the premises was to vest in the lessor immediately upon the construction of the same, subject to the provisions of the lease. The decision in Edwards v. Keith, 231 Fed. 111, 145 C. C. A. 298, L. R. A. 1918A, 498, is not contrary to this view. In that case the court held that the commissions of an insurance broker, earned before the Income Tax Law was passed, but received thereafter, constituted income taxable in the year in which they were actually received. The sole question in that case, as in this, was: When was the income received or derived?

[2, 3] We do not consider the question here involved a doubtful one; but, if there is doubt, it should be resolved in favor of the taxpayer. In Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211, it was said:

"In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

See, also, Haiku Sugar Co. v. Johnstone, 249 Fed. 103, 109, 161 C. C. A. 155.

The judgment is affirmed.

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(258 Fed. 227)

PREBENSENS DAMPSKIBSSELSKABET A/S v. MUNSON S. S. LINE.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 200.

SHIPPING ⟸40—TIME CHARTER—LENGTH OF TERM—OVERLAP.

Under a time charter for monthly hire for "about 36 months (term of charter party to be understood to mean a month more or less)," providing that, should the steamer be on a voyage toward the port of return delivery when a payment of hire becomes due, payment shall be made for such length of time as the parties estimate as necessary to complete the voyage, the difference to be adjusted on delivery as the case may require, the charterer has a permitted underlap or overlap of one month, and for a greater overlap must pay at the market rate.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Prebensens Dampskibsselskabet A/S, owner of the Norwegian steamship Falk, against the Munson Steamship Line. Decree for libelant, and respondent appeals. Affirmed.

Haight, Sandford & Smith, of New York City (Clarence Bishop Smith, of New York City, of counsel), for appellant.

Burlingham, Veeder, Masten & Fearey, of New York City (Roscoe H. Hupper, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. October 31, 1912, her owners chartered the steamer Falk to the Munson Line "for a period of about 36 calendar months (term of charter party to be understood to mean a month more or less)" from the time of delivery. The charter party was of the usual time charter form and contained the following articles:

"4. That the charterers shall pay for the use and hire of the said vessel nine hundred and fifty pounds British sterling (£950) per calendar month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery, with clean holds to the owners (unless lost) at a port in the United Kingdom or on the continent between Bordeaux and Hamburg, both inclusive (Rouen excluded), at charterers' option.

"5. That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire becomes due, said payment shall be made for such length of time as the owners or their agents and charterers or their agents may agree upon as the estimated time necessary to complete the voyage, and when the steamer is delivered to owner's agents any difference shall be refunded by steamer or paid by charterers, as the case may require."

January 20, 1913, the steamer was delivered to the charterer and redelivered by it to the owners March 1, 1916, to which date the charterer paid hire at the charter rate.

The owners contend that the term ended January 20, 1916, with a permissible overlap or underlap of one month, so that the charterer was liable until February 20, 1916, at the charter rate of freight, and for the 10 days thereafter until redelivery at the market rate of freight; the same amounting to about $9,000, to recover which this

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libel was filed. The charterer, on the other hand, contends that it is liable only at the charter rate of freight until the actual redelivery, March 1, 1916. Judge Mayer sustained the owner's contention and entered a decree for the libelant.

We think the construction of these articles is made clear by former decisions in this circuit. In the case of charters for a fixed time Judge Addison Brown held that the charterer was entitled to a reasonable overlap at the charter rate of freight. Straits of Dover S. S. Co. v. Munson (D. C.) 95 Fed. 690; Anderson v. Munson (D. C.) 104 Fed. 915. In the case of charters for "about" a named time, we have held that the charterer is entitled to a reasonable underlap as well as overlap. The Rygja, 161 Fed. 106, 88 C. C. A. 270; Trechmann S. S. Co. v. Munson Line, 203 Fed. 692, 121 C. C. A. 650.

Counsel for the charterer rely principally upon our decision in Ropner v. S. S. Co., 243 Fed. 549, 156 C. C. A. 247. In that case the charter was for a minimum period of 18 and a maximum period of 21 calendar months, at the charterer's option, and the charterer expressly exercised the option to take the steamer for the maximum period. Therefore the charter was regarded as for a fixed period of 21 months, and under the decisions supra the charterer was entitled to a reasonable overlap at the charter rate of freight. That was the ground upon which the decision rested. But an additional consideration was mentioned, viz. that the parties must have intended the overlap to be at the charter rate, because they said nothing to the contrary, and when an installment of hire fell due, payable before the estimated time for redelivery had expired, they could not estimate the future market rate of freight.

But we construe the charter in this case as being for a term of 36 months, with a permitted underlap or overlap of 1 month. It is an "about" term charter, with the "about" period defined to be 1 month. Accordingly for any overlap beyond 37 months the charterer must pay at the market rate. The owners contend that the reasoning as to the difficulty of estimating the market rate of freight at a time of redelivery in the future is the same in this case as it was in the case of Ropner v. S. S. Co. But this subordinate consideration, which was consistent with the primary ground of decision in that case, must yield to the primary ground of decision in this case, with which it is not consistent. The charterer being liable to pay the market rate of freight after the expiration of the term of 36 months and the permitted overlap of 1 month, and the last installment falling due before the time of actual redelivery, the natural estimate as to the rate of freight would seem to have been the rate prevailing at the time the installment fell due. Both the estimated time and the estimated freight were to be corrected, if necessary, at the time of redelivery.

The decree is affirmed.

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(258 Fed. 231)

In re JARMULOWSKY et al.

In re SPECTOR.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 161.

1. BANKS AND BANKING ⟸80(6)—SPECIAL DEPOSITS—NEW YORK STATUTE.
Banking Law N. Y. § 156, giving persons making deposits for safe-keeping or transmittal preferred claims against certain funds upon a private banker's insolvency, does not prevent such depositor from recovering money which he can trace and identify.

2. BANKRUPTCY ⟸140(3)—ASSETS OF BANKRUPT—NEW YORK STATUTE.
Trustee in bankruptcy of a private banker cannot retain money given bankrupt for transmittal, although Banking Law, N. Y. § 156, gives depositors for transmittal preferred claims against certain of banker's assets and authorizes them to also share pro rata with general creditors.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Harry Jarmulowsky and Louis Jarmulowsky, individually and as copartners under the firm name and style of S. Jarmulowsky. From an order granting the application of Leib Spector for payment of a preferred claim, the trustee appeals. Affirmed.

See, also, 249 Fed. 319, 161 C. C. A. 327, L. R. A. 1918E, 634.

The bankrupts were private bankers, a business in part regulated by statute in the state of New York. On the day before they suspended business and passed into the hands of the state superintendent of banking (and thence into bankruptcy), they received from the petitioner herein $288, for which they gave a receipt, setting forth that the money was to be forwarded to a definite person at a specified place in Europe "subject to conditions" on the back of said written receipt. Of these conditions the first was: "It is previously understood that we act as agents only for the sender."

Bankrupts never forwarded the money, and it was admittedly in possession of the bankrupts on the day of failure, and so ultimately passed to the trustee in bankruptcy.

Application having been made for the repayment of this money, the trustee set up as a defense section 156 of the Banking Law of New York, viz.:

"In case of the failure or suspension of any such private banker, the claims of persons for moneys on deposit or delivered for safe keeping or transmission shall be preferred against the proceeds of any securities deposited by such banker with the superintendent and against such assets as shall be shown by the books of such banker, or by other legal evidence, to have been derived from the investment of such deposits, or from the investment of any permanent capital segregated and set aside for employment in his business as such banker. The depositors shall also share pro rata with general creditors in the proceeds of any other assets belonging to such banker." Consol. Laws, c. 2.

The court below granted an order for repayment, and the trustee took this appeal.

Julius B. Baer, of New York City, for petitioner.

Samuel F. Hyman, of New York City (Jacob J. Lesser, of New York City, of counsel), for trustee in bankruptcy.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

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PER CURIAM. [1] That the Jarmulowskys in receiving this money acted in a fiduciary capacity, and that the person intrusting such money to them may on tracing the same into the possession of the trustee in bankruptcy recover it in solido, is sufficiently shown by our recent decision in Re Bolognesi, 254 Fed. 770, 166 C. C. A. 216.

As to the statute relied on, we may point out that there is in this record no evidence whatever that the bankrupts ever deposited any securities with the superintendent of banks or possessed any investments of the kind contemplated by the act; but, assuming the existence of such deposit or investment, we are of opinion:

1. The statute was not intended to and does not take away from persons dealing with a private banker as "depositors" or "transmitters" any rights or privileges, legal or equitable, which by general law they possessed prior to the passage of said act. It does exclude all creditors from participation in certain specified assets, until the claims of depositors and transmitters are satisfied.

The granting of such priority or preference is by statute made a condition for the lawful transaction of the business of private banking; but such preference cannot of itself deprive a man of the right of tracing and claiming his own money when found in the possession of an unfaithful fiduciary—which is all that has occurred in the present instance.

[2] 2. Assuming that this petitioner as a transmitter is entitled to the statutory preference, the granting of the application below removed him from competition with other creditors similarly situated in respect of the assets described in the statute.

In so far as the trustee represents such preferred creditors, he is benefited by the order complained of; in so far as he represents general creditors, neither they nor he, as their representative, have any right to keep funds which are identified as the very money of petitioner below.

Order affirmed, with costs.

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(258 Fed. 233)

SCHUMANN v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5275.

ARMY AND NAVY ⟸40—ESPIONAGE ACT—PROSECUTION FOR VIOLATION.
An indictment under Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), for obstructing the recruiting and enlistment service, *held* sufficient, the trial *held* without prejudicial error, and a judgment of conviction sustained by the evidence.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Criminal prosecution by the United States against Wilhelm Schumann. Judgment of conviction, and defendant brings error. Affirmed.

C. H. Van Law, of Marshalltown, Iowa, for plaintiff in error.

F. A. O'Connor, U. S. Atty., of Dubuque, Iowa, and Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa, for the United States.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

CARLAND, Circuit Judge. The plaintiff in error (hereafter defendant) was indicted and convicted for a violation of section 3 of the Espionage Act, approved June 15, 1917 (40 Stat. 219, c. 30 [Comp. St. 1918, § 10212c]). The indictment contained two counts, the first of which was eliminated by demurrer. The second count charged that defendant, on or about November 11, 1917, at Pomeroy, Calhoun county, Iowa, did then and there willfully obstruct the recruiting and enlistment service of the United States, by delivering a sermon in a church of which he was then and there pastor, in which sermon in the presence of a large number of people, among them being registrants under the Selective Service Law of May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. §§ 2044a–2044k]), he used the following language:

"That this war in which America is engaged is for the capitalists only and the Liberty Bond is a great humbug; by buying Liberty Bonds you buy yourself deeper into slavery; America went into this war to help England; that America had no right to go into the war against Germany and that Germany was right; that he was asked to take up a collection for the Red Cross, but we could raise our own money and send it to our own Germans and help them out; that it was a money war, and men were making money out of it; that he did not believe in the Y. M. C. A. at all; that it is gotten up by the Methodists, and I want my people to stay away from it and stay by the Lutheran Church; that our boys should not go over and shed their blood to help England."

The defendant has brought the case here by writ of error. The questions raised may be stated as follows: (1) The indictment is insufficient, in that it does not set forth any overt act, or that there was any obstruction as a matter of fact to the recruiting and enlistment service of the United States. (2) Error in the admission of evidence in regard to the statement made by defendant, for the reason that there was no evidence to show that the statement was directed toward the

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*Certiorari denied 250 U. S. 661, 40 Sup. Ct. 10, 64 L. Ed. —.

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enlistment or recruiting service of the United States. (3) Insufficiency of the evidence to sustain a conviction, in that the language used was nothing more than the expression of opinion, criticism, and argument, and in no way directed to the matter of the recruiting and enlistment service of the United States. (4) Error in the instructions of the court to the jury wherein the court defined the meaning of the word "obstruct" as used in the statute. (5) The unconstitutionality of the Espionage Act.

We have carefully read the record in this case, and find no merit in the contentions made by counsel for defendant. They have all been ruled upon adversely to him in the following cases: Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566 (March 10, 1919); Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470 (March 3, 1919); Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561 (March 10, 1919); O'Hare v. United States, 253 Fed. 538, 165 C. C. A. 208; Doe v. United States, 253 Fed. 908, 166 C. C. A. 3.

Judgment affirmed.

(258 Fed. 234)

MORAN et al. v. MORGAN et al.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 193.

BANKRUPTCY ⟸165(2)—PROPERTY PASSING TO TRUSTEE—FRAUDULENT CONVEYANCE BY BANKRUPT.

A voluntary conveyance of property by a bankrupt to his wife when insolvent *held* not in execution of a parol trust imposed by his grantor, and fraudulent as to his creditors.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by William L. Moran, trustee in bankruptcy of Charles Hobart Morgan and Albert B. Morgan, individually, as composing the firm of Morgan Bros., against Charles Hobart Morgan, Harriet M. Morgan, and the Blue Bird Motor Cab Company. Decree for complainant, and defendants Morgan appeal. Affirmed.

See, also, 252 Fed. 719, 164 C. C. A. 559.

Michael J. Tierney, of New Rochelle, N. Y., for complainant.

Samuel F. Swinburne, of New Rochelle, N. Y. (Richard Leo Fallon, of New Rochelle, N. Y., of counsel), for defendants.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. The explanation given by Charles V. Morgan of his affidavit dated March 25, 1909, is not very convincing, but in view of the manner in which Harriet M. Morgan concealed the document, even from her own attorney, down to the trial, we can have no confidence in it, and lay it out of the case altogether.

The real issue is between the testimony of Charles V. Morgan, who says he did not intend to prefer his son Charles H. Morgan or his

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wife and children over his son Albert B. Morgan, who had no children, and the testimony of his attorney, Samuel V. Swinburne, who says he did intend to provide for the four Morgan boys. Assuming Mr. Swinburne's account to be correct, we are quite satisfied that Charles V. Morgan did not intend the stable premises to become, as stated in the fourth article of the answer, "the property of the defendant Harriet M. Morgan and the children of said Charles H. Morgan and Harriet M. Morgan, subject to the use of the same by the defendant Charles H. Morgan and Albert B. Morgan, composing the firm of Morgan Bros., so long as they should remain in business and require the use of the same."

Mr. Swinburne, as attorney for Charles V. Morgan, drew the deed of the premises dated February 9, 1909, in fee to Charles H. Morgan, with a limited estate to Albert B. Morgan, saying nothing whatever about Harriet M. Morgan or the children, and when he subsequently, as attorney for Charles H. Morgan, drew his deed for the premises dated September 30, 1913, which should have effectuated the intention of Charles V. Morgan, he made it direct to Harriet M. Morgan in fee, without any mention whatever of the children.

We accordingly conclude that, if Charles V. Morgan intended to prefer Harriet M. Morgan and the children, he intended to do so through Charles H. Morgan, who as he thought was entirely solvent, relying upon his natural disposition as husband and father to dispose of the premises for the benefit of his wife and children. Such a conveyance would not be good against his creditors.

The decree is affirmed.

(258 Fed. 235)

SMILING v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 1, 1919.)

No. 1666.

INTOXICATING LIQUORS ⟸236(1)—ILLICIT DISTILLING—SUFFICIENCY OF EVIDENCE.

Evidence that witnesses found whisky, molasses, meal, and an iron pot containing liquid which apparently had been boiled in defendant's house, etc., *held* to sustain a conviction for illicit distilling.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

John Smiling was convicted of illicit distilling, and brings error. Affirmed.

John H. Clifton, of Sumter, S. C., for plaintiff in error.

Francis H. Weston, U. S. Atty., of Columbia, S. C. (J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C., on the brief), for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

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KNAPP, Circuit Judge. Plaintiff in error, herein called defendant, was convicted of illicit distilling. The record shows no objection to any testimony offered by the government and no exception to the charge to the jury. The only assignment of error is based on the refusal of the trial court to direct a verdict in his favor.

Three witnesses for the government testified in substance that they went to defendant's farm in Sumter county, S. C., to look for a whisky still, and found him plowing in a field; that he accompanied them to his house, where they found a 20-gallon iron pot on the fire, "full of stuff which looked as if it had been boiled"; that in a corner of the room was a 60-gallon barrel half full of meal and molasses, and also a 10-gallon can with some molasses in it; that two bottles of a substance which smelled like whisky, and was admitted by defendant to be whisky, were found in his bureau; that they also found a wooden tub with an auger hole which had some clay around it, and that the tub had the appearance of recent use; that as they were about to examine the contents of the pot the defendant suddenly turned it over, so that they were unable to procure a sample. Some other circumstances of like import were detailed by the witnesses.

It is enough to say without argument that this testimony was ample to justify the jury in finding a verdict of guilty. As here presented, defendant's case is wholly without merit, and the judgment must be affirmed.

(258 Fed. 236)

SULLIVAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5144.

CRIMINAL LAW ⟸1048, 1130(2)—ERROR—ABSENCE OF EXCEPTIONS AND SPECIFICATIONS OF ERROR.

Where no exceptions were saved in the District Court as to the matters complained of on writ of error, and the brief for plaintiffs in error contains no specification of the errors relied on in the Circuit Court of Appeals, such as is required by rule 24 (198 Fed. xxiv, 115 C. C. A. xxiv), there is nothing before the Circuit Court of Appeals to support the writ of error.

In Error to the District Court of the United States for the Western District of Missouri.

Thomas R. Sullivan and others were convicted of a violation of Penal Code, § 37, by having conspired to violate the conscription act, and they bring error. Affirmed.

Redmond S. Brennan, of Kansas City, Mo., for plaintiffs in error.

Francis M. Wilson, U. S. Atty., of Kansas City, Mo. (Elmer B. Silvers, Asst. U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

Before CARLAND, Circuit Judge, and AMIDON, District Judge.

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AMIDON, District Judge. Plaintiffs in error were convicted under an indictment charging them with violating section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]). The offense specified as the object of the conspiracy was a violation of the Conscription Act (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2044a–2044k]). No exceptions were saved in the trial court as to the matters now complained of. The brief for plaintiffs in error contains no specification of the errors relied upon in this court, such as is required by rule 24 (198 Fed. xxiv, 115 C. C. A. xxiv). There is before us, therefore, nothing to support the writ of error. Notwithstanding these grave omissions, we have examined the record sufficiently to satisfy us that the defendants were all rightfully convicted as the result of a fair and impartial trial. The matters discussed in the brief relate not to questions of law, but to questions of fact. Upon such a record we do not feel called upon to enter into a discussion of the facts to show that the evidence supports the verdict.

The judgment is affirmed.

(258 Fed. 237)

HALLOWELL et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. June 6, 1919.)

No. 3141.

On rehearing.

Former opinion (253 Fed. 865, 165 C. C. A. 345) adhered to.

Before GILBERT and HUNT, Circuit Judges, and RUDKIN, District Judge.

PER CURIAM. A rehearing of the above-entitled cause was ordered, for the reason that one of the judges before whom the argument was made was disqualified, in that he had signed and allowed the bill of exceptions. Upon the rehearing of the case no reason is perceived for departing from the decision heretofore rendered by this court. All of the points in the case have been covered by the opinion heretofore filed.

The judgment is therefore affirmed.

*Rehearing denied October 14, 1919.

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(258 Fed. 238)

EGNER v. PARSHELSKY BROS., Inc.

In re FOOTE.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 207.

BANKRUPTCY ⊂=166(3)—PREFERENCE—KNOWLEDGE OF INSOLVENCY.

A defendant *held* to have had knowledge that a bankrupt was insolvent at the time it took back property previously sold to him, which rendered the transaction a preference.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in equity by Henry W. Egner, trustee in bankruptcy of George P. Foote, against Parshelsky Bros., Incorporated. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 254 Fed. 907.

H. S. & C. G. Bachrach, of Brooklyn, N. Y., for appellant.

Hastings & Gleason, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

(258 Fed. 238)

THE ROSABEL.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 217.

TOWAGE ⊂=11(9)—INJURY TO TOW—LIABILITY OF TUG.

Injury to a tow in rough weather *held* not due to violation or negligent performance of the towage contract, which rendered the tug liable.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by Nicola Capiello against the steam tug Rosabel; George W. Wilson, claimant. Decree for respondent, and libelant appeals. Affirmed.

John A. Anderson, of New York City, for appellant.

Macklin, Brown & Purdy, of New York City (William F. Purdy, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

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(258 Fed. 289)

PENNSYLVANIA R. CO. v. SWIFT & CO.

(Circuit Court of Appeals, Third Circuit. July 1, 1919.)

No. 2368.

1. CARRIERS ⟸211—LIVE STOCK—FEEDING—INTERSTATE SHIPMENT—LIABILITY FOR FEEDING.
   Act Cong. June 29, 1906 (Comp. St. §§ 8651–8654), "to prevent cruelty to animals in transit," does not contemplate a divided, dual duty, but a single, unitary one to feed and water cattle in interstate transit, and the shipper may not escape liability for a part of the feed so furnished by the carrier under government inspection, because shipper placed a part of the required feed in the car without such inspection, prior to shipping.
2. CARRIERS ⟸211—INTERSTATE SHIPMENT OF LIVE STOCK—FEEDING.
   A carrier cannot recover from shipper the price of feed placed in the cars by virtue of the provisions of Act Cong. June 29, 1906 (Comp. St. §§ 8651–8654), requiring feeding in transit.
3. CARRIERS ⟸211—LIVE STOCK—FEEDING IN INTERSTATE TRANSIT—CONTRACT—IMPLIED FROM CUSTOM—PLEADING.
   A carrier cannot recover from shipper the price of feed furnished and placed in cars upon an implied contract from acquiescence in such practice, where no claim of implied contract was asserted in the statement of claim filed or submitted to the jury and not pleaded, although there was sufficient evidence to warrant the issue.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by the Pennsylvania Railroad Company against Swift & Co. Judgment for plaintiff, and defendant brings error. Judgment reversed, and cause remanded.

R. D. Rynder, of Chicago, Ill., and M. Hampton Todd, of Philadelphia, Pa., for plaintiff in error.

John Hampton Barnes, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and HAIGHT, District Judge.

BUFFINGTON, Circuit Judge. In the court below the Pennsylvania Railroad Company sued Swift & Co., the owner and shipper of certain cattle, for food furnished said cattle at the stockyards in Pittsburgh while in interstate transportation. The cattle were received by the railroad at Chicago. At the end of a 28-hour run they reached Pittsburgh. Swift & Co., who were large shippers, had made no provision for feeding and resting their cattle at Pittsburgh. That duty, under the statute hereafter quoted, fell on the railroad, and it had provided proper pens in the stockyards at Pittsburgh for thus feeding, watering, and resting the cattle. Into this same yard came trains of cattle which had carried cattle for 28 hours from Chicago without being unloaded. There came also other trains of cattle which had been rested and fed at Crestline, Ohio, and which had been but 15 hours in transit without feeding. As both the 15-hour and the

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28-hour cattle were unloaded at any of the Pittsburgh pens indifferently, and as a larger feed had to be given the 28-hour cattle, the railroad, in order to better handle the feeding, unloading, and reloading of the cattle, placed in the feeding racks of the pens, in advance of the arrival of all cattle, 150 pounds of feed. In the case of the Crestline, or 15-hour, cattle, this was all they got at Pittsburgh. But in the case of the Chicago, or 28-hour, cattle, the railroad furnished at Pittsburgh an additional 100 pounds of feed. If this extra 100 pounds were placed in the racks of the resting pens, it would have occasioned great delay and inconvenience, because in that case the Crestline cattle would have to be kept out of the pens where this extra 100 pounds was placed for the Chicago cattle. The railroad company, therefore, instead of placing such extra 100 pounds in the racks of the resting place, placed it in the standing cars, where the Chicago cattle would eat it after they left the pens. In this way, the cattle had more time for rest in the pens, the railroad could better and more expeditiously handle the traffic, and the cattle had some food to eat in transit if they so desired. The government had its inspectors at Pittsburgh, to see that this humane statute was duly observed.

Before Swift & Co. shipped their cattle at Chicago, they placed 150 pounds feed for each animal in the cars, and, regarding such 150 pounds as a partial feeding of the 250 pounds, which all parties concede is a proper feeding for a 28-hour run, Swift & Co. notified the railroad company to feed only 100 pounds to the cattle in the Pittsburgh rest pens. Their contention was that the 150 pounds they themselves placed in the cars in Chicago and the 100 pounds placed by the railroad company in the pens at Pittsburgh under their order constituted the proper feeding of 250 pounds, which, as we said, all parties agree was the proper amount to be fed during or at the end of a 28-hour run. For this extra 100 pounds thus fed by the railroad company, Swift & Co. paid the railroad. The railroad company, on its part and as it appears in accordance with the requirements of the government inspectors at Pittsburgh, contended that, the duty of feeding the cattle during the entire trip not having been assumed by Swift & Co., said duty could not be divided, and that the entire duty was imposed on them, viz. to furnish the proper 250 pounds of feed to the cattle when they came to Pittsburgh. The railroad, therefore, instead of restricting itself to the 100 pounds of feed which Swift & Co. desired fed at Pittsburgh, fed 150 pounds additional, 50 pounds of which, in addition to the 100 pounds desired by Swift & Co., they placed in the pens, and the other 100 pounds of which they placed in the standing cars. Swift & Co. paid for 100 pounds of the 150 pounds placed in the pens, and denied their liability to pay the additional 50 pounds placed in the pens. For this 50 pounds, which we will call the "contested pen feed," the railroad brought this suit, and for the 100 pounds placed by the railroad in the cars, and which we will call the "contested car feed," the railroad also brought suit. Having recovered judgment for both these items in the court below, Swift & Co. sued out this writ of

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error, and the fundamental question involved is the construction of Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. §§ 8651–8654), entitled "An act to prevent cruelty to animals while in transit." So far as pertinent to the present case, that act provides:

"That no railroad * * * transporting cattle * * * through another state * * * shall confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours."

It further enacts:

"The animals so unloaded shall be properly fed and watered during such rest either by the owner or person having custody thereof, or in case of his default in so doing, then by the railroad, * * * at the reasonable expense of the owner; * * * but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires."

There is a radical difference between Swift & Co. and the Department of Agriculture as to the proper construction of the statute, and therefore as to the proper performance of the statutory duty of feeding, but when their differences are analyzed it is clear that both Swift & Co. and the Agricultural Department are in substantial accord that the proper amount of feed for a 28-hour transit is 250 pounds, and it is on that theory that Swift & Co. had fed 150 pounds when they shipped the cattle at Chicago and directed the railroad to feed the 100 pounds additional at Pittsburgh. Where they differ in the construction and application of the statute is as to when, where, and by whom the 250 pounds should be fed to the cattle. It will thus be seen that the question in issue is really a test one between the shippers of cattle and the Department of Agriculture, and that the railroad's only course was to comply with whatever the law meant and its proper application.

[1] After careful consideration, we are of opinion the construction of the law contended for by the government is the proper one. The law gives the owner and shipper of cattle the option of performing the statutory duty of feeding his cattle in transit, but if he does not assume that statutory duty the act compels the railroad to perform it. Manifestly, the statute does not contemplate a divided, dual duty, but a single, unitary one, which the owner primarily has the right to perform; or, if he does not assume the duty, the railroad must. To hold the duty was a divisible one would result, not only in neglect of the cattle, but in the absence of that governmental inspection of the cattle in transit, which safeguards them from unnecessary suffering. From this it follows that if the duty is a unitary one, if the shipper does not assume that duty in its entirety, and if it is cast on the railroad, the shipper cannot hamper the railroad with conditions, or by any voluntary part performance on its part add to or detract from the railroad's obligation to perform the statutory duty in its entirety. Now, the statute compels the railroad, after a transit of 28 hours, to unload the cattle "in a humane manner, into properly equipped pens for rest, water, and feeding, for * * * at least five consecutive

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hours," and that "the animals so unloaded shall be properly fed and watered during such rest." In carrying out that statutory requirement, the railroad has provided at Pittsburgh, at the terminus of a run which is approximately 28 hours from the great cattle shipping point of Chicago, suitable pens, with facilities for rest, water, and feed. The government has its inspectors at Pittsburgh, to see that the provisions of the law are complied with, and, as we have noted, the unquestioned fact is that a 250-pound feed given at Pittsburgh would comply with the statute and fit the cattle for the next long-hour run of the journey east. The railroad having thus provided water, food, and rest facilities at Pittsburgh, and the proper amount of food for the cattle at that point being 250 pounds, and the cattle owner not having exercised his primary right of assuming the duty in its entirety, it inevitably follows, in our judgment, that no voluntary act of the shipper in partially feeding, without governmental inspection, the cattle at other times and places can lessen the duty of the railroad to provide proper food at the rest pens at the end of the 28-hour transit. It follows, therefore, that when Swift & Co., who had volunteered to place 150 pounds of food in the cars before the cattle started from Chicago, sought to prevent the railroad from furnishing more than 100 pounds of food to the cattle at the end of the 28-hour run in Pittsburgh, this was an unwarranted effort to prevent the railroad from performing its full statutory unitary duty at Pittsburgh. Such being the case, it follows, therefore, in so far as the item of "contested pen feed" is concerned, namely, the 50 pounds additional which the railroad sought to recover, it was clearly entitled to recover, and to that extent the verdict and judgment of the court below was justified.

[2, 3] Turning next to the item of "contested car feed," it is quite clear to us that, if such 100 pounds of extra food could have been and had been placed in the pens and there fed to the cattle, the railroad company would have been entitled to recover therefor. But, in point of fact, it did not place it in the pens, but placed it in the cars, where the animals could get it after leaving the pens. Counsel for the railroad now concede at bar that the placing of this food in the cars was not justified by the statute, but assert that the railroad is entitled to recover the price of the food thus furnished, because of an implied contract of Swift & Co. to pay for it, which it alleges arose from its acquiescence in that practice. In other words, they claim the right of recovery upon an implied contract, and they contend that the existence of such a contract was submitted to the jury and determined in the railroad's favor. Had such been the case, this judgment would have been justified in its entirety, but, unfortunately for the contention of the railroad, this cannot be done, for two reasons: First, no claim on such an implied contract is asserted in the statement of claim filed; and, second, the question of the existence of such a contract was not submitted by the court to the jury. As to the first point, the statement of claim is based wholly on the right of the railroad to recover this "contested car feed" item as a performance of a statutory duty, and there is no reference whatever to any implied

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contract arising from the acquiescence of Swift & Co. Therefore under the pleadings that fact was not in issue. As to the contention that such unpleaded issue was submitted to the jury and found in the defendant's favor, an inspection of the charge shows that this is not the case. It is true it was assumed by the court in its charge that there was such a contract, and virtually the jury was directed so to find; but, in point of fact, that issue was not submitted, and therefore such issue cannot be taken as a fact determined by the jury's verdict. It follows, therefore, that this portion of the verdict cannot be sustained. We deem it proper, however, to say that, in view of the fact that there was evidence on that subject which would have warranted the submission of that issue to the jury had it been raised by the pleadings, and as the case must go back for retrial, we see no objections to the railroad company, by proper amendment, asserting such grounds of recovery and raising this question, so that the liability of Swift & Co. on this implied contract, arising from acquiescence, may be determined. We also deem it proper to say we find no error in the court's admission in evidence of the departmental circular concerning proper feeding, and, moreover, there was really no dispute in the case but that 250 pounds was a proper feeding for a 28-hour run.

The judgment below is reversed, and the case remanded for further proceedings in accord with this opinion.

(258 Fed. 293)

ISSENHUTH v. KIRKPATRICK.

(Circuit Court of Appeals, Eighth Circuit. May 29, 1919.)

No. 5279.

1. ACTION ⟸22—ACTION AT LAW—FRAUD.
Action is one at law; the complaint, though alleging a sale of stock by plaintiff to defendant, in which defendant made fraudulent representations, which were relied on by plaintiff, not offering to return the stock nor seeking cancellation of plaintiff's notes given in part payment, but asking only for money judgment equal to money he had paid and his unpaid notes.

2. ELECTION OF REMEDIES ⟸3(2)—INCONSISTENT REMEDIES—SALES.
It is an election between inconsistent remedies, preventing subsequent change, where one, defrauded in a purchase and knowing the facts, brings action for damages, instead of rescinding and suing for what he had paid.

3. ELECTION OF REMEDIES ⟸9—OPERATION—CHANGE BY STATUTE.
The rule that one, having with knowledge of the facts made an election between inconsistent remedies, abandons the other and may not elect again, is not changed by Judicial Code, § 274a (Comp. St. § 1251a), authorizing a party to amend his pleading, to obviate objection that action was brought on the wrong side of the court.

4. JURY ⟸31(1)—DEPRIVATION OF RIGHT—TRANSFER TO EQUITY DOCKET.
For the court to permit a transfer of action at law for fraud in a sale to the equity docket is an error affecting the substantial right of defendant to a jury trial, requiring reversal.

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Appeal from the District Court of the United States for the District of South Dakota; Frank A. Youmans, Judge.

Action by R. H. Kirkpatrick against Charles C. Issenhuth. Decree for plaintiff, and defendant appeals. Reversed, with directions.

In the lower court the plaintiff, Kirkpatrick, filed a bill of complaint against the defendant, Issenhuth, alleging that Issenhuth had sold him, in June, 1912, 250 shares of the capital stock of the United Mercantile Agency, hereafter referred to as the company, and that he had made the purchase relying on false and fraudulent representations made by the defendant and known by him to be false. The plaintiff alleged that he had paid the defendant $3,000 in cash for the stock, had executed a series of notes for the remaining $2,000 of the purchase price, one payable each month after the sale, and had paid five of these notes. The representations alleged were, in substance, that Issenhuth had stated that the company was in a sound financial condition, doing a large and extensive business, and was a solvent and growing institution; that the stock, of the par value of $100 per share, was worth and was selling in the open market for $200 per share; that defendant had himself invested $26,000 in the company's stock, and desired more, but was unable to obtain it because the company had sold all of the stock that it wished to sell, and the only stock that could be obtained was stock reserved by the company for district managers of new offices, and that the Omaha office had had allotted to it $5,000 worth of the stock, which the person who was to be district manager must buy; that the company was not in need of money, and it would take $3,000 in cash and $2,000 in notes for the stock, which was not the stock of Issenhuth, but treasury stock of the company; that in consideration of the payment of the $5,000 for this stock the plaintiff would be made the district manager at Omaha, and would receive a salary of $150 per month for two years; that defendant claimed to be the district manager at Omaha, and that his position with the company required that he should go to new cities and open and establish offices of the company and find district managers to take sufficient stock to hold such positions.

The plaintiff averred that Issenhuth did not sell plaintiff treasury stock, but caused the company to take up the certificates for 250 shares that the defendant had owned, and to issue an equivalent amount of shares to the plaintiff, and that plaintiff turned over these shares to defendant as security for the payment of his notes for the unpaid $2,000 of the purchase price. He charged that the $3,000 he paid went directly to defendant and was kept by him, and that his notes which he made payable to the company were at once indorsed without recourse to the defendant, and still belonged to defendant and were in his possession. The plaintiff concluded by alleging that the company soon was declared bankrupt and ceased business; that he lost his position as district manager and his salary as such manager ceased; that the consideration for which plaintiff paid defendant the money and gave the notes had entirely failed. Whereupon he prayed judgment against the defendant for $5,000 and interest thereon from the date of the sale.

The answer denied generally the allegations of fraudulent representations, set forth some affirmative defenses, and alleged as a counterclaim the 19 notes signed by plaintiff, made payable to the company and assigned to the defendant, and prayed judgment for the amount thereof.

Plaintiff's reply admitted the execution of the notes, and that defendant was the owner and holder of them. The prayer of the reply was that the amount due on the notes be offset against the $5,000 and interest sought to be recovered in the plaintiff's complaint, and that plaintiff have judgment for the difference, and that the notes set forth in the defendant's counterclaim be deposited in court and canceled.

The case came on for trial, and a jury was impaneled, and the plaintiff produced evidence endeavoring to support the allegations of his petition. The defendant then requested the court to instruct the jury that a verdict should be returned in favor of the defendant. After a colloquy between court and counsel, in which plaintiff's counsel claimed that the action was not brought

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as a suit for rescission, but as an action for deceit, and the court had indicated that the motion would have to be sustained, the plaintiff asked to have the case transferred to the equity docket, and an order was made, over the objections of the defendant, transferring the case, with leave to the parties to amend their pleadings. The jury was discharged from further consideration of the case, and the evidence of the defendant was produced, and further evidence was given on behalf of the plaintiff in rebuttal.

Afterwards amended pleadings were filed, the plaintiff adding to the allegations made in his former complaint an offer to restore and to return to the defendant the certificate for 250 shares of stock in the company which was then in defendant's possession. He also alleged that the defendant still retained the 19 promissory notes that he had given, that they could be assigned to different persons, and the prayer was that the contract of sale of the shares of stock be rescinded and canceled, that the notes be returned and canceled, that the certificate for shares of stock be returned to the defendant, and for judgment for $3,250, the amount that plaintiff had paid to the defendant and for equitable relief.

An answer was filed to this amended bill of complaint, and the findings and decree of the court were in favor of the plaintiff and in accordance with the prayer of the amended bill. The defendant has appealed.

A. K. Gardner, of Huron, S. D. (Irwin A. Churchill, of Huron, S. D., on the brief), for appellant.

A. B. Fairbank, of Sioux Falls, S. D. (R. H. Warren, of Sioux Falls, S. D., on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge (after stating the facts as above). Some of the errors assigned challenge the action of the court in withdrawing the trial of the case from the jury and in ordering its transfer to the equity docket, and the trial and determination of it thereafter as if it were a suit in equity. The defendant objected to this action of the court because the evidence showed that the plaintiff was not entitled to maintain a suit for rescission, and because he had elected to bring the action as one at law for deceit and was bound by such election. The court was of the opinion that section 274a of the Judicial Code (Act March 3, 1915, c. 90, 38 Stat. 956 [Comp. St. § 1251a]) authorized the transfer.

[1, 2] The plaintiff did not bring this action until 4½ years after he purchased the defendant's stock. Long before he brought his action he knew the substantial facts as to the fraud that he says was perpetrated upon him by the defendant. The plaintiff elected to sue at law for his damages. He did not offer to return the shares of stock which stood in his name. He did not seek a cancellation of his outstanding notes, but asked only for a money judgment of an amount equal to the money he had paid defendant and to the amount of his obligation on the unpaid notes. The action was therefore one at law. Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451; Curriden v. Middleton, 232 U. S. 633, 34 Sup. Ct. 458, 58 L. Ed. 765; White v. Boyce (C. C.) 21 Fed. 228; 1 Pom. Eq. Jur. § 237. He had a choice between two remedies—either to rescind the purchase and recover what he had paid, or to affirm the contract and to sue for the

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damages he had sustained. The remedies were inconsistent, and an election of one was an abandonment of the other. Stuart v. Hayden, 72 Fed. 402, 18 C. C. A. 618; A. Klipstein & Co. v. Grant, 141 Fed. 72, 72 C. C. A. 511; In re Jacob Berry & Co., 174 Fed. 409, 98 C. C. A. 360; 2 Black on Rescission, § 612.

In the case of Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52, the court quotes with approval this statement of the rule from a decision of the Supreme Court of Michigan (Thompson v. Howard, 31 Mich. 309):

"A man may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again."

[3, 4] Has this rule changed by the enactment of section 274a of the Judicial Code? which reads:

"That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

There is no legal reason why the plaintiff should not have brought his action at law as he did, though there may have been practical reasons why an equitable suit would have been wiser. He had the right to consider the nature of the proofs he would be required to furnish, and the comparative advantages of the forms of relief offered and of the means of enforcing a judgment or decree; but, when he had elected between the institution of inconsistent remedies, it cannot be said that an action at law for deceit, which he properly brought, if he chose to bring it, should have been brought as a suit in equity. The transfer to the equity docket was not asked because of any claimed discovery that his action for deceit should have been brought in equity, but because there seemed to be a failure of proof of an essential element of his case. Section 274a of the Judicial Code permits one who is entitled to a remedy to retain it in the suit he has brought by a transfer of the case to the proper docket, although his suit may have been brought at law, when it should have been brought in equity, or vice versa; but it does not restore a remedy to one who is not entitled thereto, when he has abandoned and waived it in favor of an inconsistent remedy. The action of the court in permitting a transfer of this case to the equity docket was an error affecting the substantial right of the defendant to a jury trial in a law action (Ex parte Simons, 247 U. S. 231, 38 Sup. Ct. 497, 62 L. Ed. 1094), and requires a reversal of the decree and a new trial. As the remaining questions may

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not be presented in the same form after a new trial, it is not necessary to consider them further.

The decree of the lower court will be reversed, with directions to vacate the order transferring the case to the equity docket and to grant a new trial in the action at law.

(258 Fed. 297)

CHARLESTON & W. C. R. CO. v. ALWANG et al.

(Circuit Court of Appeals, Fourth Circuit. April 1, 1919.)

No. 1658.

1. RAILROADS ⟸350(7)—CROSSING ACCIDENT—SIGNALS FROM TRAIN—QUESTIONS OF FACT.

In an action for injuries to soldiers riding in an army truck, struck by a train at a crossing, where there was evidence that defendant's employés had disregarded Code Civ. Proc. S. C. 1912, § 3222, requiring bell and whistle signals to be given on crossing highways, the issue of defendant's negligence was for the jury.

2. NEGLIGENCE ⟸93(1)—NEGLIGENCE OF ARMY TRUCK DRIVER IMPUTABLE TO OCCUPANT.

The negligence of a sergeant, driving an army truck struck at a crossing, is not imputable to the soldiers riding in it; the sergeant running the truck at the command of the superior in one branch of the service, and the others being on the truck at the command of a superior in another branch of the service, so that they were not voluntarily riding together, and neither one having any authority over the other.

3. RAILROADS ⟸350(13)—CROSSING ACCIDENTS—QUESTION FOR JURY—WILLFUL NEGLIGENCE OF PERSON INJURED.

Evidence that soldiers, riding in an army truck struck by a train at a crossing, were racing with another truck just before the collision, *held* not to show as a matter of law that they were guilty of "gross or willful negligence," within Code Civ. Proc. S. C. 1912, § 3230, so as to bar recovery for injuries caused by failure to give statutory signals.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph T. Johnson, Judge.

Action by Andrew A. Alwang and others against the Charleston & Western Carolina Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

T. P. Cothran, of Greenville, S. C., and F. B. Grier, of Greenwood, S. C. (Grier, Park & Nicholson, of Greenwood, S. C., Nichols & Nichols, of Spartanburg, S. C., and Cothran, Dean & Cothran, of Greenville, S. C., on the brief), for plaintiff in error.

Jesse W. Boyd, of Spartanburg, S. C. (Frank L. Tyson, of New York City, and Ben Hill Brown, of Spartanburg, S. C., on the brief), for defendants in error.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

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KNAPP, Circuit Judge. In this grade crossing case the following facts appear: About a mile north of the town of Woodruff, S. C., the railway of plaintiff in error, hereinafter called defendant, crosses a public highway known as the Buncombe road. The crossing is elevated some 4 or 5 feet above the natural level of the highway, which is graded up to the rails on either side. At the time of the accident the crossing and approaches thereto were all in good condition. For several weeks before some army trucks, each with a complement of men, had been engaged in hauling wood from a point about 6 miles out on the Buncombe road to Woodruff, where the wood was loaded into cars for shipment to Spartanburg.

On the day in question, about 10 o'clock in the forenoon, two loaded trucks started for Woodruff, the first some three-quarters of a mile ahead of the other. The leading truck was operated by Sergeant Hurlbut, and on it were four privates. The second was operated by Sergeant Hoyt, with Corporal Alwang sitting at his left on the driver's seat, and Privates Martin, Keehner, Curtis, and O'Neals up on the load behind them. All the men were familiar with the crossing and had passed over it several times that morning. The Hoyt truck was traveling at greater speed, and overtook the Hurlbut truck about 300 feet from the crossing. Hurlbut presently kept to the left of the road, to allow Hoyt to pass, and they ran side by side for perhaps 100 feet, when Hurlbut slowed down and Hoyt went ahead, being then within a short distance of the crossing. At that moment a freight train running some 30 miles an hour, which probably had not been heard because of the noise made by the trucks, came to the crossing from the right; that is, from the direction of Woodruff. Hurlbut saw the train and stopped; but Hoyt, although he reduced speed going up the incline to the tracks, did not or could not stop in time to avoid a collision. The right front of the truck was struck by the locomotive, Martin was killed, and Alwang, Keehner, and Hoyt more or less severely injured.

The defendant claims that the trucks were racing but its testimony to that effect was contradicted by plaintiffs' witnesses. There was also some disagreement about the extent of obstructions to a view of the track as the crossing was approached. For a distance of approximately 30 feet from the rails the view was wholly unobscured, as all agree, and in that distance the truck, going at the speed described, could easily have been stopped. Further away, for a stretch of some 70 feet, the view was partially obstructed, or momentarily cut off, by a few scattering trees along the roadside or in the adjoining field. It is enough to say on this point that for a distance of at least 100 feet from the crossing Hoyt could have seen the train in question without much difficulty, if he had looked in that direction.

The plaintiffs rely upon sections 3222 and 3230 of the Code of South Carolina, the material parts of which read as follows:

"Sec. 3222. A bell * * * and a steam whistle shall be placed on each locomotive engine, and such bell shall be rung, or such whistle sounded * * * at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be

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kept ringing or whistling until the engine has crossed such highway or street or traveled place. * * *"

"Sec. 3230. If a person is injured in his person or property by collision with the engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, * * * unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence * * * and that such gross or willful negligence * * * contributed to the injury."

[1] On the occasion under review the whistle was undoubtedly blown at the prescribed distance, giving the usual signal; but it was not blown after that, and the bell was not rung at all as the train came on to the crossing. This disregard of a statutory duty made a case for the jury on the issue of defendant's negligence, and their verdict for the plaintiffs is conclusive.

[2] In discussing briefly the remaining question, we shall assume that Hoyt, the driver of the truck, was guilty of such gross negligence as would bar recovery for any injuries he may have sustained. But his negligence, whatever its degree, was not imputable to the other men on the truck. They had no authority over him, nor he over them. All were soldiers under orders. Hoyt was running the truck at the command of a superior in one branch of service, and the others were on the truck at the command of a superior in another branch of service; that is to say, they were not voluntarily riding together, and therefore not under "mutual responsibility in a common enterprise," to quote a phrase from Schultz v. Old Colony Street Ry. Co., 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402, in which the subject is exhaustively reviewed. This peculiar relation, or want of relation, between Hoyt and the other soldiers, differentiates the instant cases, as we think, from such a case as Davis v. C., R. I. & P. Ry. Co., 159 Fed. 10, 88 C. C. A. 488, 16 L. R. A. (N. S.) 424, where the plaintiff was riding in a buggy with his friend, who drove the horse, for the purpose of visiting a point of mutual interest, or Brommer v. Penn. R. Co., 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924, in which it was held that Henderson, the guest of Brommer on a pleasure ride, was guilty of negligence which defeated his action, because, "being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Brommer to look out for the safety of the machine," or Hall v. West Jersey & S. R. Co., 244 Fed. 104, 156 C. C. A. 532, which was also the suit of a guest of the automobile driver and decided against the plaintiff on the authority of the Brommer Case, or the numerous state cases cited by defendant, in which persons voluntarily riding with the driver of a vehicle, for their mutual pleasure or advantage, and having equal opportunity to see and warn against the dangers of a railroad crossing, have been denied recovery on the ground of contributory negligence. But in our opinion the cases at bar are in a different category. These men were not on the truck for their own purposes or of their

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own volition. They were there by compulsion, in obedience to military command, without freedom to act or direct, and it seems but reasonable to hold that they were not under the same obligation to be on the lookout or give needed warning as persons riding with a driver of their own accord, by his request or their desire, and at full liberty to take such action as emergency might require.

[3] Moreover, under the South Carolina statute above quoted, when a railroad company fails to comply with its provisions, the highway traveler injured at a crossing may recover compensation, unless it is shown that, "in addition to a mere want of ordinary care," he was "guilty of gross or willful negligence." And we are unwilling to say, taking into account all the circumstances of record, which need not here be recited, that the men for whom these suits are brought were guilty of gross or willful negligence as matter of law, even if it be true that Hurlbut and Hoyt were engaged in a race just before the accident. On the contrary, we think the jury had the right to find that they were wanting at most in ordinary care, and even to find that, as soldiers under orders, they were not wanting in such care as ordinarily prudent persons would exercise in like situation. From every point of view the facts are clearly more favorable to the plaintiffs than those appearing in the recent case of Southern Pacific Co. v. Wright, 248 Fed. 261, 160 C. C. A. 339, which holds that the question of the contributory negligence of an automobile passenger, injured by the reckless conduct of its driver, was properly submitted to the jury.

It follows that the rulings of the trial court, refusing to direct a verdict for defendant and rejecting certain requested instructions, were not erroneous, and the judgment will therefore be affirmed.

(258 Fed. 300)

DODGE v. UNITED STATES.*

(Circuit Court of Appeals, Second Circuit. May 16, 1919.)

No. 212.

1. CRIMINAL LAW ⟸864 — TRIAL — COMMUNICATION BETWEEN JUDGE AND JURY.
   Any communication from trial court to jury in a criminal case, not made in open court, is improper.
2. CRIMINAL LAW ⟸1174(1)—HARMLESS ERROR—COMMUNICATION BETWEEN COURT AND JURY.
   Trial court's improper action in privately advising jury that they might convict under a certain count is not reversible error, where no information was given which was not contained in original charge.
3. INDICTMENT AND INFORMATION ⟸159(2)—SURPLUSAGE—POWER TO STRIKE OUT.
   Trial court's action in striking certain words in a count on motion by government, to which defendant made no objection, constitutes error fatal to a conviction on that count.
4. WAR ⟸4—ESPIONAGE ACT—INSTRUCTIONS.
   In a prosecution under Espionage Act, instruction regarding defendant's right to freedom of speech, and power of Congress to enact laws abridging such freedom in time of war, *held* not improper.

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*Certiorari denied 250 U. S. 660, 40 Sup. Ct. 10, 64 L. Ed. —.

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5. War ⇐4—Espionage Act.
The Espionage Act is constitutional.

6. Criminal Law ⇐1159(4) — Questions Reviewable — Credibility of Witnesses.
On appeal in a criminal case, the court cannot pass upon the veracity of witnesses.

7. Criminal Law ⇐991(2)—Excessive Sentence—Effect.
That the court exceeded its authority by providing that accused's imprisonment should be at hard labor does not invalidate the authorized portion of the sentence.

In Error to the District Court of the United States for the Western District of New York.

William Dodge was convicted of violating the Espionage Act, and he brings error. Judgment on third count affirmed.

Irving M. Weiss, of Buffalo, N. Y. (Eustace Reynolds, of Buffalo, N. Y., of counsel), for plaintiff in error.

Stephen T. Lockwood, U. S. Atty., and John H. O'Day, Asst. U. S. Atty., both of Buffalo, N. Y.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff in error, hereinafter called the defendant, comes into this court to reverse a conviction under Espionage Act June 15, 1917, c. 30, 40 Stat. 217, as amended by Act May 16, 1918, c. 75, 40 Stat. 553. The indictment was based upon section 3 of title 1 of the act (Comp. St. 1918, § 10212c) which is found in the margin.[1]

[1] "Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States, or the making of loans by or to the United States, and whoever, when the United States is at war, shall willfully cause, or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of anything or things, product or products, neces-

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The indictment contains four counts. The first count in substance states that the defendant on June 22, 1918, at Buffalo, while the United States was at war with Germany and Austria-Hungary—

"* * * did then and there knowingly, wrongfully unlawfully, feloniously, and willfully utter and publish language intended to incite, provoke, and encourage resistance to the United States and promote the 'cause of its enemies,' by appearing upon the public streets in the presence and within the hearing of a large crowd of men forming part of the military forces of the United States, and capable of bearing arms, and, with the intent that they should hear, did then and there give utterance to words in substance to the effect that the United States should not be at war; that on July 3, 1918, there would be a meeting at the corner of Spring and Genesee streets, behind closed doors, at which things would be told about the war, and that his hearers were all invited to attend, and by inflection, tone of voice, and innuendo he, the said William Dodge, did then and there convey to his hearers the impression that things would be disclosed at said meeting about the present war that would bring the form of the government of the United States and the military and naval forces of the United States into contempt, scorn, contumely, and disrepute; and he, the said William Dodge, did furthermore then and there willfully utter, publish, and proclaim to the aforesaid crowd of men words and language in substance as follows:

"'Let us organize and follow the leaders, the agitators. Now they call us agitators pro-Germans. What right has the government to call us such now? If there was anything for us to fight for, we would do so, every one of us; but what are we fighting for? Nothing to our advantage; nothing for our good; nothing for our benefit. This war is not worth fighting for.'

"And at the same time and place the said William Dodge did enter into an argument with one of the audience, who stated that he was enlisted in the army of the United States, and the said William Dodge did then and there by word of mouth publicly heap scorn and contumely upon the said person because of his enlistment in the said army."

The second count states that—

"at the same time and place and by the same means the defendant did knowingly, wrongfully, unlawfully, feloniously, and willfully attempt to cause and incite insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States."

The third count states that—

"at the same time and place, and in the same manner and by the same means as set forth in the two previous counts, the defendant did * * * knowingly, wrongfully, unlawfully, feloniously, and willfully attempt to obstruct the recruiting and enlistment service of the United States."

The fourth count states—

"the manner and means of alleged violation, and charges that under the same circumstances and at the same time and place the defendant did in the same way by word and act oppose the cause of the United States in the aforesaid war."

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sary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

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The defendant pleaded not guilty. After a trial which lasted for several days, the jury rendered a verdict acquitting him on the second and fourth counts, and convicting him on the first and third counts. The defendant was sentenced to be imprisoned in the Maryland state penitentiary at Baltimore, Md., at hard labor for a term of six years.

The defendant's father was born in England and his mother in France. He himself was born in Buffalo, and he is a member of the Socialist Labor Party and of the Workers International Industrial Union, which prior to 1915 had been called the I. W. W.

[1, 2] It appears that while the jury was deliberating on its verdict the bailiff in charge brought to the judge a communication from it. Upon its receipt he summoned the counsel for both sides to his chambers and informed them that he had received a communication from the jury, but that he did not think he should disclose its substance at that time. Thereupon counsel withdrew and the judge returned an answer to the jury's communication by the bailiff in charge. After the verdict was received the judge informed counsel that what the jury had asked was whether defendant could be convicted on the first count, and that he replied, "Yes;" and he stated that he had not at the time apprised counsel of the contents of the note, or of the reply, as it did not seem to him to be of enough importance, especially as he had in his instructions informed them that the defendant could be found guilty of one or all counts, or none at all; and it has been assigned as error that the court communicated with and instructed the jury, not in open court, and not in the presence and without the knowledge and consent of the defendant or his counsel, after the jury had retired to deliberate on their verdict.

It has been held in a few cases that after a jury has retired the court may give an instruction on a question of law in the absence of counsel. Bassett v. Salisbury Mfg. Co., 28 N. H. 438; Milton School District No. 1 v. Bragdon, 23 N. H. 507; Shapley v. White, 6 N. H. 172; Goldsmith v. Solomons, 2 Strob. (S. C.) 296, 300. In the case last cited the court said:

"The intercourse between the jury and the bench is, in many respects, very confidential. Often the communications from the jury are of that kind which ought not be communicated to the bar."

These cases are contrary to the clear weight of authority. In 38 Cyc. 1859, it is said:

"It is almost universally held that no communication ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge, unless in open court."

That is undoubtedly the law. The leading case on this subject is Sargent v. Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185, which was decided by the Supreme Court of Massachusetts in 1823. In that case, after a jury had been out for six hours, the foreman wrote to the judge, at his chambers, that they could not agree and that they waited for his directions. The judge replied in writing, saying that he was unwilling to permit them to separate, and gave such directions as would enable them to reconsider the cause in a more systematic man-

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ner. And he directed the jury to bring his letter into court with them in order that it might be filed with the papers in the case. A new trial was ordered. The opinion was written by Chief Justice Parker, who said:

"As it is impossible, we think, to complain of the substance of the communication, the only question is whether any communication at all is proper, and, if it was not, the party against whom the verdict was is entitled to a new trial. And we are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and, where practicable, in the presence of the counsel in the cause."

The courts are practically unanimous in holding that private communications between court and jury are improper, and that all communications should be made in public. They are not, however, unanimous in holding that a private communication between judge and jury will in any case in which it occurs nullify the verdict. In Moseley v. Washburn, 165 Mass. 417, 43 N. E. 182, the judge answered a written question from the jury as to the date from which to compute interest; it having been covered in the original instruction. This was held not to require reversal. In Whitney v. Commonwealth, 190 Mass. 531, 77 N. E. 516 (1906), a civil case, the judge communicated with the jury privately, the communication being a collateral direction as to the manner of using the papers supplied for the reception of a verdict, and the court held that this did not require the verdict to be set aside. The court said in the Whitney Case:

"There are grave objections to any communication with a jury made as this was. * * * But the facts stated in this case make it certain that no miscarriage of justice has resulted."

In Buntin v. Danville, 93 Va. 200, 24 S. E. 830, the judge answered a question of the jury, both question and answer being in writing, without informing counsel, who were in court engaged in another case. The court declined on that account to reverse, and declared that, while the better practice is to inform the counsel of any question asked by the jury, the irregularity would not vitiate the verdict, as the answer correctly stated the law and the verdict was plainly right. In People v. Kelly, 94 N. Y. 526, the judge answered a written communication from the jury. It did not appear what the communication was. The court held that the question was not properly raised by affidavit, and implied that the harmful nature of such communication should be shown, saying that the presumption is that there was no violation of duty on the part of the court.

The only case in the federal courts which has come to our attention is Fillipon v. Albion Vein Slate Co., 242 Fed. 258, 155 C. C. A. 98, decided by the Circuit Court of Appeals in the Third Circuit. The court held that under the circumstances of the case a written communication between the court and the jury, after the jury had retired, is not ground for reversal in a civil case, where no harm results; the question and answer being preserved of record. The question in that case concerned the applicable rule of contributory negligence. The

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court found nothing to complain of in the answer, and the only question was whether there ought to be a reversal because the instruction was not given in open court. In its opinion the court said:

"Is there a compelling reason of policy why a trial fairly and accurately conducted must be always set aside, where such an irregularity has crept in, although it has done no actual harm, and is unlikely to do harm? We do not see our way to answer this question in the affirmative, and must therefore affirm the judgment."

And see Grabinsky v. Smit, 20 Mo. App. 50; State v. Nash, 51 S. C. 319, 28 S. E. 946.

In the instant case it is evident that no possible harm resulted or could result from the communication which passed between court and jury. The communication gave the jury no information which was not contained in the original charge. While the judge should not have done what he did, to reverse on that ground would under the circumstances be so extremely technical that it does not at all approve itself to our judgment.

[3] At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word "mutiny" from the first paragraph of the second count. Counsel for defendant at once said: "No objection." The court granted the motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted. The rule is almost universally recognized, both in this country and in England, that an indictment cannot be amended by the court, and that an attempt to do so is fatal to a verdict upon the count.

The Supreme Court in Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849, declared that it was beyond question that in the English courts indictments could not be amended, and that no authority had been cited in the American courts which sustained the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute. In that case the trial court amended the indictment by striking out six words as being surplusage. The Supreme Court held that this deprived the court of power to try the prisoner. There was only one count in the indictment in that case. And the court said:

"The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered."

We therefore hold in the instant case that the amendment made in the first two counts deprived the court of power to proceed upon those counts; but this did not affect the right to try the defendant upon the third and fourth counts. As the jury acquitted on the fourth count, the question is as to the validity of the third count. That count is well drawn, and the conviction under that count must be sustained unless the Espionage Act is unconstitutional.

[4-6] It was claimed at the argument that the trial judge gave the impression to the jury that the defendant had no right to freedom of speech while the country was at war, and that Congress in time of war could enact laws in violation of the First Amendment, which pro-

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vides that Congress shall make no law abridging freedom of speech. That portion of the charge complained of may be found in the margin.[2]

We see no error in the above instruction, which in effect amounted to what the Supreme Court said in the cases of Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561, and Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566. The act is constitutional and there is evidence which, if the jury believed it, justified the verdict. The evidence was very conflicting, and Dodge, who took the stand, denied flatly that he had said certain things which others stated he had said. But this court cannot pass upon the veracity of the witnesses, and determine whether Dodge or his accusers told the truth.

[7] It appears that, in sentencing the defendant to imprisonment, the court sentenced him to imprisonment for "hard labor," and that those words are not found in the act for the violation of which the conviction was obtained. But where a court has jurisdiction of the person and the offense the imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence void, but only the portion of it which is in excess. United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631.

Judgment on third count affirmed.

[2] "Another subject has been suggested during the course of this trial, in reference to which I conceive that I should give you instructions. You should understand, gentlemen, that it is a constitutional provision that a person has the right of freedom of speech, and Congress, true enough, has no right to enact laws abridging the freedom of speech; but, gentlemen, this is a much-abused term, and I instruct you that the guaranty cannot be successfully resorted to as a protection in time of war, where things that are said or uttered involve the integrity of the nation, or injure or tend to injure the United States—in other words, a citizen would not be permitted to speak or write in the time of war in a way that would interfere with the successful ending of the war. While citizens may fairly criticize the laws of Congress, and even the acts of the President, or of the army or navy, yet such criticism must be honest and based upon truth, and not with the intent to violate the Sedition Act in question. When the words uttered are accompanied by a willful intent to disobey the statute, and to obstruct the recruiting or enlistment service of the United States, or the purposes that the United States has in engaging in the war, or to induce disloyalty or insubordination, or attempt so to do, then, gentlemen, what was said becomes seditious and an infraction of the statute.

"In this respect, gentlemen, the Sedition Act, as amended in May, 1918, and under which this indictment is found, is very broad and comprehensive, and it will bear reading again. This is an extraordinary measure, limited to times when the United States is at war, and by that I mean to be understood as saying that very likely the things that are claimed to be said, if they were said, would not be a violation of the statute if we were not at war, but being at war, a different situation presents itself, and Congress has met the situation by enacting the statute to which I am now calling your attention."

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(258 Fed. 307)

SEARS, ROEBUCK & CO. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2659.

1. TRADE-MARKS AND TRADE-NAMES ⟸80½, New, vol. 8A Key-No. Series—UNFAIR COMPETITION.

A finding by the Federal Trade Commission that a mail-order house doing an interstate business was guilty of unfair competition in selling sugars, teas, and coffees under representations that it had obtained special price concessions, because of the magnitude of its purchases, and that it purchased selected brands from abroad, *held* warranted.

2. TRADE-MARKS AND TRADE-NAMES ⟸80½, New, vol. 8A Key-No. Series—PROCEEDINGS BEFORE FEDERAL TRADE COMMISSION—INJUNCTIONAL ORDER.

An order issued by the Federal Trade Commission, commanding a mail-order house doing an interstate business to cease and desist from certain unfair practices in connection with the sale of sugar and other staple commodities, *held* not to have been improvidently issued because the mail-order house had discontinued such methods, where it was contending that Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), creating the Federal Trade Commission, was unconstitutional, or, if valid, had not been infringed, and the government's control of sugar sales and consumption had temporarily put an end to the objectionable practices in any event.

3. EVIDENCE ⟸23(1)—JUDICIAL NOTICE—GOVERNMENT CONTROL OF TRADE.

On petition to have a cease and desist order issued by the Federal Trade Commission vacated on the ground that the unfair practices of petitioner which related to sales of sugar, etc., had ceased, the court will take judicial notice of the government's control of the sale and consumption of sugar during the war, which temporarily at least put an end to the objectionable practice.

4. TRADE-MARKS AND TRADE-NAMES ⟸80½, New, vol. 8A Key-No. Series—UNFAIR COMPETITION—FEDERAL TRADE COMMISSION.

Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission authority over unfair methods of competition, and declaring the same unlawful, is not void for indefiniteness because the words "unfair methods of competition" were not defined; the trader being entitled to his day in court, where common-law principles would control.

5. CONSTITUTIONAL LAW ⟸62, 80(2)—UNLAWFUL DELEGATION OF LEGISLATIVE AND JUDICIAL POWER.

Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission power to stop unfair methods of competition in commerce and declaring the same unlawful, is not an unlawful delegation of legislative and judicial power; Congress having by the act declared the public policy applicable to the situation.

6. TRADE-MARKS AND TRADE-NAMES ⟸80½, New, vol. 8A Key-No. Series—POWERS OF FEDERAL TRADE COMMISSION—UNFAIR COMPETITION.

The Federal Trade Commission, under its authority to stop unfair methods of competition, cannot prevent a trader from selling a staple article as sugar below cost, although it may prevent such sales accompanied by representations which would injure other traders.

Alschuler, Circuit Judge, dissenting in part.

Original Petition to Review Order of Federal Trade Commission.

Original petition by Sears, Roebuck & Co. against the Federal Trade Commission, to review an order commanding petitioner to desist from certain unfair methods of competition in commerce. Commission directed to modify its orders, and petition in other respects denied.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Sidney Adler, of Chicago, Ill., for petitioner.
John Walsh, of Washington, D. C., for respondent.

Before BAKER and ALSCHULER, Circuit Judges, and CARPENTER, District Judge.

BAKER, Circuit Judge. This is an original petition to review an order entered by the respondent, the Federal Trade Commission, against the petitioner, Sears, Roebuck & Co., a corporation, commanding the petitioner to desist from certain unfair methods of competition in commerce. Respondent's order was based on its complaint, filed on February 26, 1918, on the petitioner's answer, and on a written stipulation of facts. Procedure before the commission and also before this court on review is prescribed in section 5 of the act to create a Federal Trade Commission, approved on September 26, 1914 (38 Stat. 719, c. 311 [Comp. St. § 8836e]). Respondent's authority over the subject-matter of its order is derived from the following provision in the same section: "Unfair methods of competition in commerce are hereby declared unlawful." Section 4 (Comp. St. § 8836d) is a dictionary of terms used in the act. "Commerce" means interstate or foreign commerce; but the general term, "unfair methods of competition," is nowhere defined specifically, nor is there a schedule of methods that shall be deemed unfair.

In its complaint respondent averred that petitioner is engaged in interstate and foreign commerce, conducting a "mail-order" business; that petitioner for more than two years last past has practiced unfair methods of competition in commerce by false and misleading advertisements and acts, designed to injure and discredit its competitors and to deceive the general public, in the following ways:

(1) By advertising that petitioner, because of large purchases of sugar and quick disposal of stock, is able to sell sugar at a price lower than others offering sugar for sale;

(2) By advertising that petitioner is selling its sugar at a price much lower than that of its competitors and thereby imputing to its competitors the purpose of charging more than a fair price for their sugar;

(3) By selling certain of its merchandise at less than cost on the condition that the customer simultaneously purchase other merchandise at prices which give petitioner a profit on the transaction, without letting the customer know the facts;

(4) By advertising that the quality of merchandise sold by its competitors is inferior to that of similar merchandise sold by petitioner, and that petitioner buys certain of its merchandise in markets not accessible to its competitors, and is therefore able to give better advantages in quality and price than those offered by its competitors.

Petitioner extensively circulated the following advertisements, among others:

"We can afford to give this guarantee of a 'less than wholesale price' because we are among the largest distributors of sugar wholesale or retail in the world. We sell every year thirty-five million pounds of sugar. And, buying

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in such vast quantities, and buying directly from the refineries, we naturally get our sugar for less money than other dealers."

"For instance, every grocer carries granulated sugar in stock, but does he tell you which kind? There are two kinds—granulated cane sugar and granulated beet sugar—and they look exactly alike. Some people prefer the one and some the other. But beet sugar usually costs less than cane sugar, so if you are getting beet sugar you should pay less for it. Do you know which kind you are getting and which you are paying for?

"Our teas have a pronounced, yet delicate, tea flavor with an appealing fragrance because we spare neither time nor expense to get the very best the greatest tea gardens of the world can produce.

"First, because of the difficulty of getting in this country the exact character and flavor of certain teas, we do our own importing and critically test every tea. Our representative goes to the various tea-growing countries and makes the selection in person. Then, the greatest care is taken to get only first-crop pickings from upland soil.

"Also, by buying direct from the tea gardens, while the crops are being harvested, we are able to have them always perfectly fresh.

"It would be natural for you to conclude that all this care in buying and selecting would make our teas very high in price, but in reality, our prices are unusually low for such high quality. Here is a reason: By buying direct from the tea gardens we cut out the middleman's profit."

"Over land and sea, from the greatest coffee regions in the world we bring you the choicest of the crop, and make it possible for you to have that fresh, savory, and fragrantly tempting cup of coffee for your breakfast. You see, we buy direct from the best plantations in the world. We get the pick of the crop—upland coffees from rich, healthy soil and growers of unquestioned experience and skill. We buy enormous quantities and pay cash, thus making it possible to offer our customers the very best coffees at very low prices."

[1] Petitioner's sales of sugar during the second half of 1915 amounted to $780,000 on which it lost $196,000. Petitioner used sugar as a "leader" ("You save 2 to 4 cents on every pound"), offering a limited amount at the losing price in connection with a required purchase of other commodities at prices high enough to afford petitioner a satisfactory profit on the transaction as a whole, without letting the customer know that the sugar was being sold on any other basis than that of the other commodities. Petitioner obtained its sugar in the open market from refiners and wholesalers. Competitors got their sugar from the same sources, of the same quality and at the same price. Sugar is a staple in the market. Price concessions upon large purchases are unobtainable. From the facts respecting petitioner's methods of advertising and buying and selling sugar respondent found, and properly so, in our judgment, that petitioner intentionally injured and discredited its competitors by falsely leading the public to believe that the competitors were unfair dealers in sugar and the other commodities which petitioner was offering in connection with sugar.

Petitioner purchased 75 per cent. of its teas from wholesalers and importers in the United States. The remainder it purchased through its representative Peterson in Japan; but there was no proof that Peterson made or was qualified to make "selections in person" or "first-crop pickings from upland soil." All of petitioner's coffees were purchased from wholesalers and importers in the United States. Respondent found that petitioner's advertisements of teas and coffees were false and designed to deceive the public and injure competitors.

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By the order, issued on June 24, 1918, petitioner was commanded to desist from:

"(1) Circulating throughout the states and territories of the United States and the District of Columbia catalogues containing advertisements offering for sale sugar, wherein it is falsely represented to its customers or prospective customers of said defendant or to customers of competitors, or to the public generally, or leads them to believe, that because of large purchasing power and quick-moving stock, defendant is able to sell sugar at a price lower than its competitors;

"(2) Selling, or offering to sell, sugar below cost through catalogues circulated throughout the states and territories of the United States and the District of Columbia among its customers, prospective customers and customers of its competitors;

"(3) Circulating throughout the various states and territories of the United States and the District of Columbia, among customers, prospective customers and customers of its competitors, catalogues containing advertisements representing that defendant's competitors do not deal justly, fairly and honestly with their customers;

"(4) Circulating throughout the various states and territories of the United States and the District of Columbia, among customers, prospective customers or customers of its competitors, catalogues containing advertisements offering for sale its teas, in which said advertisements it falsely stated that the defendant sends a special representative to Japan who personally goes into the tea gardens of said country and personally supervises the picking of such teas;

"(5) Circulating through the various states and territories of the United States and the District of Columbia, among customers, prospective customers or customers of its competitors, catalogues containing advertisements offering for sale its coffees, in which it falsely stated that the defendant purchases all of its coffees direct from the best plantations in the world."

[2, 3] I. Petitioner insists that the injunctional order was improvidently issued because, before the complaint was filed and the hearing had, petitioner had discontinued the methods in question and, as stated in its answer, had no intention of resuming them. For example, no sugar offers of the character assailed were made after August, 1917. But respondent was required to find from all the evidence before it what was the real nature of petitioner's attitude. It was permissible for respondent to take judicial notice of the government's wartime control of sugar sales and consumption. It was also proper to note that petitioner was contending (and still contends) that the act is void for indefiniteness, that the act is unconstitutional, and that the act, even if valid, under any proper construction has not been infringed by petitioner's practices. In Goshen Mfg. Co. v. Myers Mfg. Co., 242 U. S. 202, 37 Sup. Ct. 105, 61 L. Ed. 248, which was a suit for infringement of a patent, the defendant company averred and introduced evidence to prove that six months before the bill was filed and with notice to complainant it had sold its factory, wound up its business, and had no intention of resuming. But throughout the intervening period and also in the answer to the bill the defendant company was attacking the validity of the patent and the right of the complainant to compel desistance. This conduct was held to be such a continuing menace as to justify the maintenance of the bill. So here, no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course.

[4] II. Petitioner urges that the declaration of section 5 must be

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held void for indefiniteness unless the words "unfair methods of competition" be construed to embrace no more than acts which on September 26, 1914, when Congress spoke, were identifiable as acts of unfair trade then condemned by the common law as expressed in prior cases. But the phrase is no more indefinite than "due process of law." The general idea of that phrase as it appears in Constitutions and statutes is quite well known; but we have never encountered what purported to be an all-embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based upon accumulating experience. If the expression "unfair methods of competition" is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon "unsound mind," "undue influence," "unfaithfulness," "unfair use," "unfit for cultivation," "unreasonable rate," "unjust discrimination," and the like. This statute is remedial, and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of "rebates or concessions" or of "schemes to defraud," without any schedule of acts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the statutes were enacted. Why? Because the general ideas of "dishonesty" and "fraud" are so well, widely and uniformly understood that the general term "rebates or concessions" and "schemes to defraud" are sufficiently accurate measures of conduct.

On the face of this statute the legislative intent is apparent. The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the government as parens patriæ, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases. But the restraining order of the commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds hereinbefore recited are expected by Congress to control. This prima facie reading of legislative intent is confirmed by reference to committee reports and debates in Congress, wherein is disclosed a refusal to limit the commission and the court to a prescribed list of specific acts. Cong. Rec. 63d Cong. 2d Session, pp. 13, 18, 533, 12246. And this interpretation is not affected by the subsequent adoption of the Clayton Act, October 15, 1914 (38 Stat. 731, c. 323), condemning certain specific acts.

[5] III. But such a construction of section 5, according to petitioner's urge, brings about an unconstitutional delegation of legislative and judicial power to the commission. Grants of similar authority to administrative officers and bodies have not been found repugnant to the Constitution. Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; Union Bridge Co. v. United States,

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204 U. S. 365, 27 Sup. Ct. 367, 51 L. Ed. 523; Penn. Rld. Co. v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915D, 315; National Pole Co. v. Chicago & N. W. Ry. Co., 211 Fed. 65, 127 C. C. A. 561.

With the increasing complexity of human activities many situations arise where governmental control can be secured only by the "board" or "commission" form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the Commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi legislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the commission in ordering desistance may be counted quasi judicial on account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court.

[6] IV. In the second paragraph of the order petitioner is commanded to cease selling sugar below cost. We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away. But manifestly in making such a sale or gift the owner may put forward representations and commit acts which have a capacity or a tendency to injure or to discredit competitors and to deceive purchasers as to the real character of the transaction. That paragraph should therefore be modified by adding to it "by means of or in connection with the representations prohibited in the first paragraph of this order, or similar representation."

Sufficient appears in this record and in the presentation of the case to warrant us in expressing the belief that petitioner's business standards were at least as high as those generally prevailing in the commercial world at the times in question, and that the action of the commission is to be taken rather as a general illustration of the better methods required for the future than a specific selection of petitioner for reproof on account of its conduct in the past.

Respondent is directed to modify its order as above stated; and in other respects the petition is denied.

ALSCHULER, Circuit Judge (dissenting in part). In my judgment the order of the commission should be further modified by striking out the third paragraph, which relates to alleged representation that petitioner's competitors do not deal fairly and honestly with their customers. In so far as the sugar, coffee, and tea advertisements ascribe petitioner's asserted lower prices and superior qualities to quantity purchases and special facilities and advantages for inspection, selection, and purchasing, they would tend to negative any im-

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putation upon competitors of unfair dealing with their patrons. I believe the charge of imputing to competitors unfair dealing with their patrons rests wholly on petitioner's so-called "Caveat Emptor" advertisement in its catalogue of March and April, 1916, wherein the public is cautioned in regard to white sugar, stating that some is cane and some beet sugar, alike in appearance, but the former usually higher in price; that petitioner plainly designates which of the two it offers, and the query is suggested, where else are goods so plainly described, and whether the customer gets elsewhere what he thinks he is buying. It seems to me that this does not amount to more than a statement or boast that petitioner, without being asked, describes the white sugars it proposes to sell, and the intimation is carried that competitors do not volunteer such description, but it is not suggested that they actually misrepresent the truth.

The facts before the commission appear by stipulation, and those concerning this advertisement, aside from the advertisement itself are as follows:

"When Mr. A. M. Daly, the attorney in charge of the investigation in these proceedings, was in Chicago, in March, 1916, he submitted to Mr. A. V. H. Mory, chief chemist of Sears, Roebuck & Co., and Mr. Joseph Scott, manager of the grocery department, a copy of the advertisement entitled 'Caveat Emptor' hereinbefore mentioned, and hereto attached, and requested them to state their views as to this particular advertisement and what it meant. They stated that this advertisement was for the purpose of calling attention to the distinction between beet sugar and cane sugar and laying stress upon the point of the facilities that Sears, Roebuck & Co. have for marking everything plainly so that the customer would know better from description the exact nature of what he was buying. After this explanation Mr. Daly went to his hotel. In a short time Mr. Mory called on him there and stated in substance that he had submitted the above-mentioned advertisement to Mr. A. H. Loeb, the vice president of Sears, Roebuck & Co., and that Mr. Loeb said that this course of advertising was unfair and unjust and declared that it must be discontinued, and further that it was against the policy of the house to send out such advertisements. Thereupon, on March 28, 1916, Mr. A. V. H. Mory, chief chemist, wrote to the commission in part as follows: 'The young man who wrote this was in to-day and I pointed out to him wherein he had made a mistake and acted against house policy. He promised to use the soft pedal on all references to the dealer in the future. He tells me that this is an angle that had not occurred to him. He had not thought of the write-up in the light of a criticism of the dealer, so intent was he on pointing out that with our system of marking everything plainly and our facilities for knowing what we are selling the customer would know better from our description the exact nature of what he was buying, in the case of those things difficult to judge than if he had them placed before him—which of course is true.'"

But assuming, as did petitioner's vice president, that this advertisement does carry the imputation that competitors deal unfairly with their customers, under the circumstances indicated by the quotation ought this advertisement to be the basis of a finding and order? The publication was in the catalogue for March and April, 1916. The complaint was filed nearly two years afterwards. The act authorizes the commission to proceed when it shall have reason to believe that unfair methods of competition are or have been used, "and if it shall appear to the commission that a proceeding by it in respect thereof would be of interest to the public." In a monitory proceeding such

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as this seems to be, it could hardly be said that it would be "of interest to the public" to predicate action on a transgression for which due amends had long before been made, without remotest cause to believe there would be a repetition. To revive a stale advertisement of this nature which the advertiser immediately after the publication distinctly disavowed as having been unintentionally and inadvertently unfair to competitors, and ordered discontinued, without directly or indirectly repeating or renewing it for so long an interval, far from subserving the public interest, might, in my judgment, have the contrary tendency of raising an imputation of oppressive or at least uncalled-for action, in predicating any proceeding or order on this advertisement.

Nor am I impressed with the authoritative relevancy here of decisions respecting injunctions. In a proceeding such as this, neither remedial nor punitive, decisions of courts respecting injunctional relief in equity are not more analogous than are common-law decisions defining unfair trade practices, arising out of controversies between individuals, as fixing thereby the limitation of the commission's authority or scope.

The suggested modification would necessitate corresponding modification of the commission's findings of facts, eliminating paragraphs numbered 4 and 5 thereof. Paragraphs 2, 6 and 7 (as well as paragraphs 4 and 5) of the findings state the circulation of the several advertisements to have been in each case for "more than two years last past," indicating thereby the two years next before the date of the findings, which is June 24, 1918. This is no contravention of the stipulated fact that none of the advertisements were more recent than August, 1917—some of them even antedating the passage, September 24, 1914, of the Trade Commission Act itself. These findings should, in my judgment, be modified to comply with the stipulated facts.

(258 Fed. 314)

FEDERAL TRADE COMMISSION v. GRATZ et al.*

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 236.

TRADE-MARKS AND TRADE-NAMES ⇐80½, New, vol. 8A Key-No. Series—UNFAIR COMPETITION—POWERS OF FEDERAL TRADE COMMISSION.

Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission power to investigate unfair methods of competition, does not contemplate the prohibition of unfair methods of competition between individuals, there being no authority given to individuals to present grievances, hence where defendants, who engaged in selling ties and bagging for cotton bales, refused to sell to persons with whom they had had previous unsatisfactory relations, and refused to sell ties without bagging when there was fear that, owing to the scarcity of ties and the prospect of large crops, the marketing of the cotton crop might be endangered by creating corners in ties, the commission is not authorized to make any order compelling such sales. The unfair methods contemplated by the act are such as affect the public generally.

Petition to Revise Order of the Federal Trade Commission.

Petition of Warren, Jones & Gratz, by Anderson Gratz, for an order for the review of the findings and order of the Federal Trade

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Granting certiorari 250 U. S. 657, 40 Sup. Ct. 13, 64 L. Ed. —.

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Commission, and for an order setting the same aside, in a proceeding against Anderson Gratz and Benjamin Gratz, copartners doing business under the firm name and style of Warren, Jones & Gratz, and others. Order reversed.

T. F. Magner, of Brooklyn, N. Y., for petitioner.
John Walsh, of Washington, D. C., for respondent.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a petition of Anderson Gratz, a member of the firm of Warren, Jones & Gratz, under section 5 of the Act of September 26, 1914, c. 311, 38 Stat. L. 719 (Comp. St. § 8836e), creating the Federal Trade Commission to review the following order of the commission:

"Therefore, it is ordered, that the respondents, Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz, P. P. Williams, W. H. Fitzhugh and Alexander Fitzhugh, copartners, doing business under the firm name and style of P P. Williams & Co., and C. O. Elmer, their officers and agents, cease and desist from requiring purchasers of cotton ties to also buy or agree to buy, a proportionate amount of American Manufacturing Company's bagging, and, further, that the respondents cease and desist from refusing to sell cotton ties unless the purchasers buy or agree to buy from them corresponding amounts of American Manufacturing Company's bagging, or any amount of cotton bagging of any kind.

"By the Commission, [Seal.] L. L. Bracken, Secretary."

If Anderson Gratz has not sufficient standing to file this petition, counsel for the commission has very fairly waived the objection and invited the court to dispose of the questions raised.

The first count of the complaint served on the respondents, which is the only one involved is as follows:

"Paragraph 1. That the respondents Anderson Gratz and Benjamin Gratz are copartners, doing business under the firm name and style of Warren, Jones & Gratz, having their principal office and place of business in the city of St. Louis, and state of Missouri, and are engaged in the business of selling, in interstate commerce, either directly to the trade, or through the respondents hereinafter named, ties made and used for binding bales of cotton, and which steel ties are manufactured by the Carnegie Steel Company of Pittsburgh, Pa., and also selling, in the same manner jute bagging, used to wrap bales of cotton and which jute bagging is manufactured by the American Manufacturing Company, of St. Louis, Mo.

"Paragraph 2. That the respondents P. P. Williams, W. H. Fitzhugh, and Alex. Fitzhugh are copartners, doing business under the firm name and style of P. P. Williams & Co., having their principal office and place of business in the city of Vicksburg, and state of Mississippi, and the said last-named respondents and the said respondent Charles O. Elmer, who is located and doing business at the city of New Orleans, and state of Louisiana, are the selling and distributing agents of the said firm of Warren, Jones & Gratz, and sell and distribute the ties and bagging, manufactured as aforesaid, in interstate commerce, principally to jobbers and dealers, who resell the same to retailers, cotton ginners and farmers.

"Paragraph 3. That with the purpose, intent and effect of discouraging and stifling competition in interstate commerce in the sale of such bagging, all of the respondents do now refuse, and for more than a year last past have refused, to sell any of such ties unless the prospective purchaser thereof would also buy from them bagging to be used with the number of ties proposed to

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be bought; that is to say, for each six of such ties proposed to be bought from the respondents the prospective purchaser is required to buy six yards of such bagging."

The respondents filed an answer admitting the facts stated in paragraphs 1 and 2, but denying the facts stated and the conclusion therefrom contained in paragraph 3. They appeared and offered testimony before the commission.

The commission's material findings of fact and its conclusions of law are as follows:

"Paragraph 2. That within three years last past respondents, Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones & Gratz, P. P. Williams, W. H. Fitzhugh, and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Co., and C. O. Elmer, adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging. * * *

"Paragraph 4. * * * The dominating and controlling position occupied by said respondents in the sale and distribution of ties made it possible for them to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Company, and in many instances, said respondents refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging, and such purchasers were oftentimes compelled to buy bagging manufactured by the American Manufacturing Company, from said respondents, in order to procure a sufficient supply of steel ties used for the purpose aforesaid.

"Conclusions of Law.

"That the methods of competition set forth in the foregoing findings as to the facts, in paragraphs 1, 2, 3 and 4, and each and all of them are, under the circumstances therein set forth, unfair methods of competition in interstate commerce, against other manufacturers, dealers and distributors of jute bagging and against other dealers and distributors in the material known as sugar bag cloth, and against manufacturers, dealers and distributors of the bagging known as rewoven bagging and secondhand bagging, in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and that there is not sufficient proof submitted in the hearings to sustain the paragraph in the complaint charging a violation of section 3 of an act of Congress known as the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 731 [Comp. St. § 8835c])."

By agreement between the parties the commission filed a transcript of the entire record in the proceeding before it. This court is given power by the act to affirm, modify or set aside such an order, the commission's findings of fact to be conclusive if supported by testimony.

There is testimony to support the findings of fact, and therefore the question before us is whether they do support the commission's conclusion of law that the method of competition forbidden is unfair within the meaning of section 5 of the act of September 26, 1914.

It seems to us that unfair methods of competition between individuals are not contemplated by the act. Congress could not have intended to submit to the determination of the commission such questions as whether a person, partnership or corporation had treated or bribed the

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employés of a competitor for the purpose of inducing them to betray their employer. We think the unfair methods, though not restricted to such as violate the Anti-Trust Acts, must be at least such as are unfair to the public generally. It seems to us that section 5 is intended to provide a method of preventing practices unfair to the general public and very particularly such as if not prevented will grow so large as to lessen competition and create monopolies in violation of the Anti-Trust Acts. Such a preliminary inquiry and determination constitutes a most important supplement in carrying out the public policy which those acts are intended to vindicate. This view is confirmed by the language of the section:

"Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and a place therein fixed at least thirty days after the service of said complaint."

No authority is given to any individual to present his grievances, and the commission is to interpose only in the interest of the public.

That the commission did not find sufficient proof to sustain the second count in the complaint, viz. that the method of the respondent found to be unfair violated section 3 of the act of October 15, 1914, known as the Clayton Act, which makes unlawful any condition, agreement or understanding that may lessen competition or tend to create a monopoly, shows that the method found to be unfair must have been unfair in certain individual transactions. And we discover no evidence to support the finding in paragraph 2 that the respondents "adopted and practiced the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging." It is the natural and prevailing custom in the trade to sell ties and bagging together, just as one witness testified it is to sell cups and saucers together. Such evidence as there is of a refusal to sell is a refusal to sell at all to certain persons with whom the respondents had previous unsatisfactory relations and a refusal to sell ties without bagging at the opening of the market in 1916 and 1917, when there was fear that, owing to the scarcity of ties and the prospect of large crops, the marketing of the cotton crop might be endangered by speculators creating a corner in ties. The evidence is that with these exceptions the respondents sold ties without any restrictions to all who wanted to buy, and indeed made extraordinary efforts to induce the manufacturers of ties to increase their output so that all legitimate dealers and all cotton raisers should get enough ties and bagging at reasonable rates to market their cotton. It is only these exceptional and individual cases, which established no general practice affecting the public that can sustain the findings in paragraph 4.

Counsel for the commission calls our attention to the opinion of the Circuit Court of Appeals for the Seventh Circuit, Sears, Roebuck &

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Co., Petitioners, v. Federal Trade Commission, Respondent, 258 Fed. 307, 169 C. C. A. 323. The practice there prohibited as unfair was extensive advertising containing false and misleading statements calculated to deceive all purchasers and to discredit all competitors. It was clearly a method unfair to the public generally.

As we think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of the American Manufacturing Company's bagging, and that the commission has no jurisdiction to determine the merits of specific individual grievances, the order is reversed.

(258 Fed. 318)

THE WINFIELD S. CAHILL. THE JOHN L. WADE. THE IRA M. HEDGES.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 190.

1. COLLISION ⟸95(2)—FAULT OF TUG WITH TOW.
   Steam tug towing 12 boats in three tiers, with a boat tailing on the last tier, which on rounding the Battery, in turning from the channel between the Battery and Governor's Island, to go into East River at New York, was swept away by the tide because she had not enough power for her tow, and so presented the end of her tow to a steamship skirting the shore of Governor's Island in a position that rendered collision inevitable, *held* at fault.

2. COLLISION ⟸95(2)—FAULT OF TUGS.
   Tugs in charge of a steamship, which collided with starboard boat in the last full tier of another tug's tow through the fault of such other tug, *held* to have done all they could, and as soon as they should have, to avoid collision, having had no reason to anticipate the lack of power of the other tug, which caused the collision in conjunction with the tide, and having reversed as soon as they saw the tow swing down upon them.

3. COLLISION ⟸125—DAMAGE—PROBABILITY OF EARNINGS.
   Evidence *held* to show that there was not even a reasonable probability of a steamship injured by a collision earning any charter money under the charter in question, either when she was in collision, or during the three-day period of her repairs; her owner having been "blacklisted" by the United States for reasons of state during the war with Germany and Austria.

4. COLLISION ⟸136—DAMAGES—LOSS OF USE.
   Damages for loss of use of a vessel injured in collision cannot be awarded because she might have made some profit. The question is not of the possibility of employment, but of actual loss; not what possibly could have been made, but what would have been made.

Appeal from the District Court of the United States for the Eastern District of New York.

Libel in admiralty by the Seguranca Steamship Corporation against the steam tug Winfield S. Cahill and James Brooks, its claimant, and the steam tug John L. Wade and William J. Wade, its claimant, and Edward M. Timmins and the Cornell Steamboat Company, and by Robert M. Woodburn against the steam tug Ira M. Hedges and the Cornell Steamboat Company, wherein William J. Wade, as owner of the steam tug John L. Wade, petitions for limitation of liability

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against the Cornell Steamboat Company, and James Brooks, owner of the steam tug Winfield S. Cahill, petitions for limitation of liability also against the Cornell Steamboat Company. From the decree, the Cornell Steamboat Company appeals. Decree modified and affirmed.

In daylight and fair weather, with the tide running strong ebb, the steamship Seguranca started, without motive power of her own, and in charge of three tugs (the Wade, the Cahill, and the Timmins) from the anchorage near Bedloe's Island to a point in the East River. The master of the Timmins was in charge of this operation, his owners having made a contract on the subject with the steamship's agents. The Cahill went ahead on a short hawser; the Wade and Timmins were placed one on each side of the steamship. The master of the Timmins was on the bridge of the Seguranca. In this manner steamship and tugs proceeded across the Upper Bay until they were as near to Governor's Island as was safe, and were skirting the shore of said island slightly below Castle William when the tug Hedges with a tow of about 12 boats, in at least three tiers and a boat tailing on to the last full tier, all upon a hawser of at least 30 fathoms, was seen coming down the North River. The Hedges belongs to a well-known line, and any man experienced in the navigation of this harbor knew that she was intending to round the Battery into the East River.

Against the tide the Seguranca and her tugs were making not over a knot and a half, and probably less. For her, backing was not only difficult, but dangerous, owing to the proximity of the shore on the starboard side. The Hedges had the tide with her, but had no helper; another tug had been in attendance, but had gone away with a boat taken from the tow. When these two flotillas observed each other, the Hedges (had it been night) would have shown the Seguranca her green light only, while the Seguranca had the Hedges at least 2½ points on her port bow.

The Hedges had proceeded approximately halfway across the channel between the Battery and Governor's Island before she turned to go into the East River. The moment she did so and became broadside to the tide, she was helplessly swept down by the same; and even after getting headed squarely into the tide she could do no more than stand still by the land, and even that is doubtful. Thus the tail of her tow was in the Seguranca's way. The tugs alongside the latter vessel reversed, and the Cahill for her own safety ceased towing and got out of the way. Collision ensued between the steamship's stem and the starboard boat in the last full tier of the tow.

Both vessels in collision received injury, and actions were begun by the Seguranca against the owners of the Timmins and Hedges and the tugs Cahill and Wade, and by the owner of the injured barge against the Hedges alone. By invoking the fifty-ninth rule all the parties were ultimately brought in, in respect of all the damage claimed, and the Wade and Cahill, denying all liability, nevertheless took proceedings in limitation. All these matters were tried at one hearing, and one decree entered, in which the court below held the Hedges at fault (apparently) for obstructing the path of the Seguranca, but allotted one-fourth of the damages against the Cahill and one-fourth against the owners of the Timmins, upon the ground that they should have sooner perceived the difficulties and dangers arising from the inability of the Hedges to control her tow in the tideway. From this decree the Hedges alone appealed. In this court, however, both the Cahill and the owners of the Timmins claimed freedom from fault, and all parties against whom any share of loss had been assessed objected to the allowance of "demurrage" or damages for loss of use of the Seguranca.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine, of New York City, of counsel), for the Hedges.

Burlingham, Veeder, Masten & Fearcy, of New York City (Chauncey I. Clark and George W. Whip, both of New York City, of counsel), for owners of the Timmins.

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Foley & Martin (George V. A. McClosky and William J. Martin, both of New York City, of counsel), for the Cahill.

Park & Mattison, of New York City (Henry E. Mattison, of New York City, of counsel) for owner of injured barge in tow.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for the Seguranca.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] On the facts above recited we agree with the court below that the fault of the Hedges is entirely plain. When the vessels were in such position that they were bound to navigate with due regard to each other's rights, they were admittedly on crossing courses, with the Seguranca the privileged vessel. It may be assumed as plain that the Hedges did not intend to continue such crossing course, but to turn into the East River in such manner that she would be either parallel with the Seguranca or ahead of her according to the rapidity of such turn. It is argued that she did make the turn, became the leading vessel, and put the Seguranca in the position of one overtaking. It is a sufficient answer to this to say that the steamship was proceeding so slowly that she could not overtake the Hedges, if that vessel had been able to navigate across or against the tide in the common and accepted sense of that term.

We find that this disaster occurred solely because, when the Hedges ported to go into the East River and presented the broadside of herself and her tow to the tide, she was helpless, because she had not enough power for the business in hand. Before collision actually happened she had turned herself so as to be heading almost, if not quite, toward the Battery, but whether in this position she was able to hold the tow against the tide is a point not worth discussion, for by that time (and events occurred with great rapidity) she had presented the end of her tow to the Seguranca in a position that rendered collision inevitable.

[2] As for the tugs in charge of the Seguranca, we think they did all they could, and did it as soon as they should. They were not apprised of and had no reason to anticipate the feebleness of the Hedges. As soon as they saw how the tow was swung down upon them, the Cahill ceased to haul ahead and the tugs alongside reversed, but it was too late; and the Hedges had made it too late by not trying to port and go into the East River as soon as she could—she never turned at all until unnecessarily near to Governor's Island.

The difficulties of navigating in the narrow waters between Governor's Island and the Battery are well known; the necessity of having sufficient power to meet contingencies reasonably to be expected was adverted to in The Concho (D. C.) 58 Fed. 812, affirmed 63 Fed. 1023, 12 C. C. A. 4. The dangers there alluded to have assuredly grown no less in the quarter century that has elapsed since that case was decided.

[3] The Commissioner awarded to the Seguranca damages for three days' loss of use while undergoing repairs caused by this col-

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lision. When injured the Seguranca was under charter; she never entered upon the performance of that engagement because (as we find from the record) it was obvious that the governmental authorities of the United States and of the nations associated with it in the war with Germany and with Austria would not permit the steamship to get a cargo; her owner was "blacklisted" for reasons of state. It is argued that, while all this is true, it was not obvious that it was to be true during the three days for which damages for loss of use has been awarded. It is said that, if the Seguranca had not been injured, she would have entered upon the performance of this charter party. In point of fact she made no attempt so to do, but after being repaired for damage stayed at the repair shop and was extensively overhauled for reclassification; meanwhile she was sold, so as to get rid of the "blacklisted" owner, and the charter party was ultimately canceled.

[4] We hold it established as matter of fact that there was not even a reasonable probability of the Seguranca earning any charter money under the charter in question, either when she was in collision or during the three day period of her repairs. On this finding the law is not doubtful. Damages for loss of use cannot be awarded because the injured vessel might have made some profit. The question is not of the possibility of employment, but of actual loss; not what possibly could have been made, but what would have been made. The North Star, 151 Fed. 168. 80 C. C. A. 536.

The fact, that a tort had been committed only calls in play the rule of restitutio in integrum; so that, where injured cargo nevertheless brought the full market value, the tort-feasor was not called upon to pay damages in respect thereof. The Dunbritton, 73 Fed. 352, 19 C. C. A. 449. The view we entertain of the facts herein renders unnecessary any discussion of the unusual manner in which the damages were in the court below allotted or apportioned.

Let the decree appealed from be modified, and the Seguranca and Woodburn recover their full damages, with costs of the District Court, against the Hedges. Let the proceedings in limitation on the part of the Wade and the Cahill be sustained, and both tugs exonerated from liability. As against the answering claimants, let the petitioners recover trial costs (but not expenses of limitation) in the District Court. Let the libels as against the owner of the Timmins be dismissed, with costs of the District Court. There will be no costs in this court, because the parties whom we have released altogether took no appeal, and the single appellant has prevailed only partially; i. e., in respect of the so-called demurrage claim. The Anna W., 201 Fed. 62, 119 C. C. A. 396.

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(258 Fed. 322)

HOTEL WOODWARD CO. v. FORD MOTOR CO.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 210.

1. DISMISSAL AND NONSUIT ⊂⊃44—NATURE—"NONSUIT."
A dismissal not upon the merits is a "nonsuit."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nonsuit.]

2. TRIAL ⊂⊃169—DIRECTING VERDICT—DUTY OF COURT.
In an action in the federal District Court for New York, where the trial judge reaches a correct conclusion in favor of defendant after hearing all the evidence, the jury should be directed to enter a verdict in defendant's favor, and it is improper to merely enter an order dismissing the complaint.

3. APPEAL AND ERROR ⊂⊃927(3)—REVIEW—NONSUIT.
On appeal from an order dismissing the complaint, after hearing all the evidence, it must be assumed, the order being one of nonsuit, that plaintiff's testimony is true, and he is entitled to every inference therefrom.

4. PLEADING ⊂⊃258(3)—AMENDMENT OF ANSWER—DURING TRIAL—SURPRISE.
In an action brought in New York against a Michigan corporation for breach of a contract to lease premises in New York, where the defendant corporation pleaded the New York statute of frauds as required, defendant's motion to amend at trial by pleading the Michigan statute of frauds, which would bring into the case the question whether its agent, who signed the memorandum relied on, was authorized in writing, should be denied because of surprise, although defendant was entitled to amend after motion on due notice.

5. DEEDS ⊂⊃1—WHAT LAW GOVERNS.
The law of the state in which land is situated must alone be looked to for the rules governing its alienation and transfer, and for the effect and construction of conveyances of all kinds.

6. COURTS ⊂⊃366(5)—DECISIONS—FEDERAL COURTS.
In construction of local statutes, the federal courts must follow authoritative state decisions if found of sufficient clearness in the judgments of the courts of last resort.

7. FRAUDS, STATUTE OF ⊂⊃120—WHAT LAW GOVERNS.
In an action against a Michigan corporation for breach of contract to lease for a term of years property located in New York, the New York statute of frauds (Real Property Law, § 259), which does not require an agent who signs a written memorandum to be authorized in writing, applies, instead of the Michigan statute of frauds, which requires the agent to be authorized in writing; this being so notwithstanding both the New York and Michigan statute of frauds declare a contract not evidenced by a written memorandum to be void, instead of providing, as did the original statute, that no action should be maintained thereon, in which case it was held that the law of the forum applied.

8. LANDLORD AND TENANT ⊂⊃22(4)—LEASES—AGREEMENTS.
In an action against a Michigan corporation for breach of an agreement to lease New York property for a term of years, the question whether the minds of the parties had met *held* for the jury.

9. FRAUDS, STATUTE OF ⊂⊃159—CONTRACTS—MEMORANDUM IN WRITING.
In an action against a Michigan corporation for breach of a contract to lease New York property for a term of years, the question whether the attorney and agent of the Michigan corporation who executed the written memorandum relied upon by plaintiff was authorized to do so, *held*, under the evidence, for the jury.

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10. CORPORATIONS ⇐398(1)—OFFICERS—AUTHORITY.
The president or other general officer of a corporation has prima facie power to do any act which the directors could authorize or ratify.

In Error to the District Court of the United States for the Southern District of New York.

Action by the Hotel Woodward Company against the Ford Motor Company. There was a judgment dismissing the complaint, and plaintiff brings error. Reversed and new trial directed.

Writ of error to judgment entered in the District Court for the Southern District of New York.

Very little of an unnecessarily voluminous record was necessary to present the legal questions involved. Plaintiff here and below is a corporation of New York; it keeps a hotel, and will be hereinafter called "hotel company."

Defendant here and below is a corporation of Michigan, hereinafter called "motor company," and primarily engaged in the manufacture and sale of motor cars, but its corporate powers and the laws of New York enable it to purchase and improve (in the manner giving rise to this litigation) real property in this state.

By the early part of 1916 motor company had decided to buy land in New York City and erect thereupon a salesroom and warehouse. Several officials of motor company knew the president of hotel company, and negotiations ensued looking toward the erection above the New York warehouse and salesroom of motor company of many additional stories to be rented for a long term of years to hotel company, whose already existing hostelry was contiguous. Most of these negotiations took place in Michigan. Building plans were made, expenses considered, and the talk of at least three high officials of motor company with hotel company's president was offered in evidence.

Mr. Robertson, a member of the bar, was exclusively in the employment of motor company, having his office with and in those of the corporation. In August, 1916, under instructions from at least one of the vice presidents of motor company, he received from the president of hotel company a form of lease, and in Michigan and by said vice president was instructed to "fix it up." Having examined this draft, Mr. Robertson (as was testified on behalf of plaintiff) "said he would go ahead and prepare this lease and later on we would execute it." Thereupon, at the request of hotel company's president (Green), and in Michigan, Mr. Robertson wrote, and delivered to Mr. Green, the following letter:

"Ford Motor Company.
"Detroit, U. S. A., August 31, 1916.

"Hotel Woodward Company, 55th Street & Broadway, New York City—Gentlemen: Attention of Mr. Green: Confirming our conversation, will say that draft of lease as discussed is entirely acceptable to us and same will be prepared immediately for execution. We have consented to the alterations suggested by your attorney, as they do not seem in any manner to have changed the intent of the lease.

"We leave the question of limitation of assignment of equity as security until lease is signed, but think this can be arranged to your entire satisfaction.

"As soon as the lease is ready we will come on to New York and close up the entire matter of the execution of the lease and the security as agreed. In the meantime you may go ahead with any plans you have in connection with this proposition, so that there will be no delay when the architects' plans are ready.

"Trusting this will be entirely satisfactory, we are.

"Yours very truly, Ford Motor Company,
"L. B. Robertson, General Attorney."

Shortly thereafter, Mr. Robertson did prepare and send to hotel company in New York a form of lease. The form thus prepared was a revision of the draft received by him as above stated. The lease was to run for 21 years;

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the rental was to depend upon the cost of construction, which at the time was evidently estimated at approximately $700,000; but the document provided that any excess expense should cause a rise in rental amounting to five per cent. per annum on such excess.

This form of lease prepared by Mr. Robertson was submitted to motor company's counsel in New York, and some changes suggested. New York counsel for hotel company likewise made some suggestions, as to all of which there was evidence of acceptance by hotel company. On November 2d, 1916, motor company's board of directors met in Michigan and at that meeting the following resolution was offered:

"Whereas, this company owns a parcel of land on Broadway and Fifty-Fourth street, New York, suitable for New York offices and salesrooms.

"And whereas, the land is very valuable, and to construct simply an office and salesroom, would result in an exorbitantly high cost for offices and salesroom.

"And whereas, the management of this company, on account thereof, has entered into preliminary negotiations with the Hotel Woodward to occupy part of a suitable building on such site:

"Therefore, resolved, that this company proceed with the erection of the proposed building suitable to that site, for the use of this company as offices and salesroom, and that the negotiations of the management looking to the lease of the balance thereof to the Hotel Woodward Company for a period of twenty-one years be and they are hereby ratified and confirmed, and the management is authorized to erect the building at an approximate cost of $740,000, and enter into said lease.

"After some discussion further consideration of this resolution was deferred until the next meeting."

At the next meeting of the board the matter was thus treated:

"It was moved by Mr. Rackham and supported by Mr. Klingensmith, that the resolution pertaining to the building on the property owned by the Ford Motor Company at the corner of Fifty-Fourth street and Broadway, New York, as outlined in the resolution of the meeting of November 2, 1916, and at which time the resolution was deferred, be ratified, and that officers be given authority to proceed."

Hotel company gave evidence tending to show that, after receipt of Mr. Robertson's letter of August 31st, both parties had assumed that the matter was closed, except for details to be adjusted by attorneys for each party and the formal execution of a written lease.

On the part of motor company, evidence was given tending to show that, so far as the talk between the officers of the two corporations went, it had at all times been made plain by motor company that the making of any lease, and not only the renting, but even the construction of what was to be rented, depended upon the making of satisfactory and reasonably economical contracts for physical construction of anything more than motor company needed for its own business in New York City.

In the early part of 1917 it was discovered (according to evidence given for motor company) that the cost of construction would be not approximately $700,000, but about a half million more than that. When this possible enormous excess was communicated to hotel company, it declared its willingness to pay by way of additional rental, 5 per cent. per annum, even on such enormous excess; but motor company was either not willing, or not able, to spend the additional money, and refused altogether to proceed with the matter.

This action at law was then brought by hotel company against motor company to recover damages for breach, not of a lease (for no document called a "lease" was ever delivered or even executed), but to obtain compensation for the breach of a contract to make a lease.

The defenses pleaded were, in substance, that there never was any such meeting of minds as could be called a contract; but that, if there were, the same was voided under the statute of frauds.

The language of the answer in setting up the statute plainly referred to the New York Act, i. e. section 259 of the Real Property Law (Consol. Laws, c. 50) which is as follows:

"*When contract to lease or sell void.*—A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest

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therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the lessor or grantor, or by his lawfully authorized agent."

The case having come on for trial, and plaintiff having rested, the motor company moved to amend by pleading the Michigan statute of frauds, reading as follows:

"Sec. 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized by writing." Comp. Laws, § 11977.

To this amendment hotel company objected on the ground of surprise, but over due exception the amendment was granted.

At the close of the whole case the trial judge dismissed the complaint, holding in substance that, if the minds of the parties had met in an agreement to make a lease in the form shown in evidence, such agreement or contract was voided by the statute of frauds, but gave no intimation as to whether he deemed the New York or Michigan statute applicable to the matter in hand.

Judgment having been entered upon this direction, this writ was taken, and, though plaintiff in error insists upon all duly taken exceptions, two principal questions have been argued:

(1) To the transaction shown, is the statutory law of Michigan or of New York to be applied?

(2) If the applicable statute does not bar the suit, was plaintiff below entitled to go to the jury?

Holm, Whitlock & Scarff, of New York City (Charles H. Tuttle, of New York City, Stephen C. Baldwin, of Brooklyn, N. Y., and Victor E. Whitlock, of New York City, of counsel), for plaintiff in error.

Crisp, Randall & Crisp, of New York City (Alfred Lucking, of Detroit, Mich., and W. Benton Crisp, of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1, 2] One matter of procedure justifies preliminary attention. The trial judge dismissed the complaint after having heard all the evidence adduced by both parties. It is clear from the record that the court ordered a dismissal instead of directing a verdict for the defendant because plaintiff's trial counsel insisted that nothing more than a dismissal was proper under the New York Code of Civil Procedure.

This was a mistake in form; a dismissal (not upon the merits) is a nonsuit, but where, after hearing all the evidence, the trial judge reaches a correct conclusion in favor of the defendant, the jury should be directed to enter a verdict in that defendant's favor. Stumpf v. Hallahan, 101 App. Div. 383, 91 N. Y. Supp. 1062; affirmed 185 N. Y. 550, 77 N. E. 1196. The rule in the federal courts we stated in Re Iron Clad Manufacturing Co., 197 Fed. 281, 116 C. C. A. 642.

[3] The case being before us, however, on a nonsuit, we "must assume * * * that plaintiff's testimony is true, and that they are thus entitled to the benefit of every fair inference therefrom." Davis v. Carnegie Steel Co., 244 Fed. at page 933, 157 C. C. A. at page 283.

[4] Another trial matter must be noted: The amendment pleading the Michigan statute of frauds should have been denied. It has been often held that the statute may be availed of under a general denial

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(e. g. Third National Bank v. Steel, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119); but this defendant had specifically pleaded the New York statute, as required by Crane v. Powell, 139 N. Y. 379, 34 N. E. 911, and Matthews v. Matthews, 154 N. Y. 288, 48 N. E. 531. Doubtless it is "common form" to object to amendments as surprising; but, when the distinction between these two statutes, and the course of this trial is considered, the truth of this plea of surprise is manifest, and its result is to produce a legal question that might have been wholly avoided.

One effect of the amendment made after plaintiff rested was to raise the question whether Robertson's authority (if he had any) was oral or written, if the Michigan statute applied. We search the record in vain for any evidence that testimony on this point had been sought for; certainly none is presented to us, and it was going too far to insert this issue in a case actually on trial in New York, when such written authority as might exist certainly sprang into existence and remained of record in Michigan.

As, however, defendant (so far as we can see) was entitled to amend after motion on due notice, and the question intended to be raised is of importance upon any future trial herein, we shall consider it now.

[5-7] It is not doubted that we must look only to the law of the state in which land is situated for the rules governing its alienation and transfer and for the effect and construction of conveyances of all kinds. Olmsted v. Olmsted, 216 U. S., at page 393, 30 Sup. Ct. 292, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292, and cases cited. If, therefore, this action related to land title, there would be no doubt that the contract transferring the same would be governed and interpreted by the law of New York alone; for the proposed 21-year lease is an estate in lands, and real property under the law of this state. But the plaintiff herein is not suing to establish a title, nor is it seeking to procure one by way of specific performance or otherwise. The action is personal and transitory and asserts liability in the defendant for breach of a personal obligation only; there is no effort to obtain an interest in the res; indeed, inability to obtain such interest is presupposed, and relief in personam only is demanded.

Reduced to its simplest legal form, the question here is whether the lex loci contractus (or, more accurately, the lex loci conditionis), or the lex rei sitæ applies when a statute of frauds is invoked as a defense. The diversity of judicial opinion revealed by endeavors to discover what law governs the validity of a contract is a most extensive subject, and the results of exhaustive research were stated by Prof. J. H. Beale in 1909.[1] The manifest inclination of the courts has usually been toward treating statutes of frauds like other statutes regulating or limiting the right of contract and to find "the law of the contract" (as it is called in St. Louis R. R. v. Terre Haute R. R., 145 U. S. at page 405, 12 Sup. Ct. 953, 36 L. Ed. 748) in the law of the place where the contract was made. But mingled with this current of decision (turbid as it is) is plainly discernible the conflicting inclination to identi-

[1] Harvard Law Review, vol. 23, pp. 1, 79, 194, and 260.

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fy all contracts relating to land and all actions for breach of such contracts with conveyances of title to interests in land, to which, as above stated, the lex rei sitæ always applies.

Thus the inquiry at bar is narrowed to the following question: What is the law of a contract made in Michigan for the conveyance of an interest in New York realty when the action is to recover money damages only in a personal and transitory suit for the breach of such contract, and action is brought in a court of the United States sitting in New York?

This comparatively small fraction of the larger subject may be, and has been, treated in several different ways.

One view has been compendiously and authoritatively stated by Mr. Dicey substantially as follows: All rights over or in relation to an immovable are governed by the law of the country where the immovable is situate: the effect of a contract with regard to an immovable is governed by the proper law of the contract—and "proper law of the contract" means the law by which the parties may be fairly presumed to have intended the contract to be governed. Dicey's Conflict of Laws (Ed. 1908) pp. 500, 510, and 529. This may be regarded as the prevailing, or at least most often stated, English view, and of it Prof. Beale notes that it almost invariably results in finding that the law of the contract is the law of England. This method of statement has often been chosen by our federal courts (Pinney v. Nelson, 183 U. S. at page 148, 22 Sup. Ct. 52, 46 L. Ed. 125, citing Wayman v. Southard, 10 Wheat. 48, 6 L. Ed. 253); and it has likewise at times obtained favor in the courts of New York (Stumpf v. Hallahan, supra). Whether this view is wholly consistent with Bank of Africa v. Cohen (1909) 2 Ch. 129, may be doubted, for it was there held that a married woman's capacity to contract concerning her own land in the Transvaal was governed solely by the law of the Transvaal, although she had assumed to contract in England, and an action to compel specific performance was promoted in Great Britain.

Another and often prevailing view is that a statute of frauds is a law concerning evidence, not affecting the inherent validity of contracts nor the capacity of the contractors to enter into obligation, but merely prescribing stringent rules by which alone the intent and purpose of the parties shall be made manifest; wherefore the lex fori applies. This doctrine, commonly thought to rest on Leroux v. Brown, 12 C. B. 801, has been apparently approved in Pritchard v. Norton, 106 U. S. 134, 1 Sup. Ct. 102, 27 L. Ed. 104.

But the distinction has been drawn in respect of the differing language of the statutes of different sovereignties. Many acts, like the original of 29 Car. II, c. 3, declare in substance that no action shall be brought except it be supported by a written contract or a note or memorandum thereof. Others (like the present statutes of New York and Michigan) declare that contracts not so supported shall be void. Statutes in the earlier form have been regarded as rules of evidence in Heaton v. Eldridge, 56 Ohio St. 87, 46 N. E. 638, 36 L. R. A. 817, 60 Am. St. Rep. 737; Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; and Third National Bank v. Steel, supra. The matter is well dis-

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cussed in Obear v. First National Bank, 97 Ga. 587, 25 S. E. 335, 33 L. R. A. 384, and it is pointed out that where the statute merely forbids suit it is matter of evidence or remedy, and the lex fori applies. But Wolf v. Burke, 18 Colo. 264, 32 Pac. 427, 19 L. R. A. 792, rests upon the proposition that the statute of that state, like that of New York, renders the oral contract void, wherefore the doctrine of the Leroux Case is inapplicable; and this view of the New York statute has received the approbation of the late Prof. Dwight, sitting as referee in Marie v. Garrison, 13 Abb. N. C. (N. Y.) 258. The whole doctrine of Leroux v. Brown is disapproved in Wharton's Conflict of Laws (3d Ed.) § 689, et seq. Nevertheless support can be found for the view that even the New York statute is a rule of evidence. Crane v. Powell, supra; Matthews v. Matthews, supra.

When the inquiry is narrowed to discovering judicial pronouncements in respect of personal actions brought for breach of contract regarding land, made in a state other than that of the land itself, the results are equally varied. The view that in such an action the lex rei sitæ has no application is thought to have obtained vogue largely (though not wholly) from the decision of Holmes, J., in Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452. This judgment is approved by Wharton, supra (section 276d), and in Minor's Conflict of Laws (1901) p. 416 et seq. In Finnes v. Selover, 102 Minn. 334, 113 N. W. 883, it was decided that where a contract was made in one state for the purchase of lands in another, and the money was to be paid in the state where the contract was made, lex rei sitæ governed as to title, and lex loci contractus as to the rights of the parties. This doctrine was followed in a litigation which as Selover v. Walsh reached the Supreme Court in 226 U. S. 112, 33 Sup. Ct. 69, 57 L. Ed. 146 (decided below 109 Minn. 136, 123 N. W. 291). While the highest court took pains to state that they were not concerned with the applicability of any given statute of frauds to the contract in hand, but only with an alleged violation of the federal Constitution, by such application, occasion was taken apparently to approve the doctrine of Polson v. Stewart, supra. See, also, the converse of the situation in Kryger v. Wilson, 242 U. S. 171, 37 Sup. Ct. 34, 61 L. Ed. 229. In the latter cause the courts of North Dakota had applied the lex rei sitæ, and the Supreme Court held that such application was "purely a question of local common law" and not a matter with which the Supreme Court of the United States was concerned.

While the writer of this opinion yields individual assent to the reasoning of Polson v. Stewart, it is the duty of this court to ascertain, if possible, what the law of New York is on this subject, and whether this court of the United States is bound to follow the same. In cases not legally distinguished from the present, it has been asserted (though without discussion of principle) that the statute of New York is not applicable to a personal and transitory suit there brought to recover damages for breach of a contract affecting foreign land; but that in such action, brought and tried in New York, lex rei sitæ is applicable. Abell v. Douglass, 4 Denio (N. Y.) 309; Burrell v. Root, 40 N. Y. 496.

This view has been similarly asserted or assumed in Siegel v. Robin-

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son, 56 Pa. 19, 93 Am. Dec. 775; Bissell v. Terry, 69 Ill. 184; Baird, etc., Co. v. Harris, 209 Fed. 291, 126 C. C. A. 217; and more fully in Meylink v. Rhea, 123 Iowa, 310, 98 N. W. 779. This is probably the rule generally prevailing down to date.[2] Yet so fluid is the discussion that Cardozo, J., in Reilly v. Steinhart, 217 N. Y. 553, 112 N. E. 469, can refer to the whole matter here discussed as one "often debated and with varying conclusions."

But so far as the pronouncements of the highest court of this state are concerned, while authority can be found for the dogmatic rule of Burrell v. Root, for the doctrine of Leroux v. Brown, and for that of Prof. Dicey, no judicial support can yet be discovered for the only view that makes the Michigan statute applicable in this litigation, i. e. that lex loci conditionis must be applied.

In the construction of local statutes the national courts must follow authoritative state decisions, if found of sufficient clearness in the judgments of the courts of last resort. Re Seward Dredging Co., 242 Fed. 229, 155 C. C. A. 65. The "laws of the several states" to which the courts of the United States yield obedience comprise, not only state statutes, but the decisions of the highest courts. Nashua Bank v. Anglo-American Co., 189 U. S. 228, 23 Sup. Ct. 517, 47 L. Ed. 782; cf. Chicago, etc., Co. v. Kendall, 167 Fed. 66 et seq., 93 C. C. A. 422, 16 Ann. Cas. 560. That a federal court sitting in a given state will follow the statute of frauds of that state, see Buhl v. Stephens (C. C.) 84 Fed. 922. It may be said that, while the federal courts are bound to follow the authoritative state interpretation of a local act, the rule does not apply to the application of the statute. We think the distinction is not one of substance, and Farley v. Carey, etc., Co., 249 Fed. 476, 161 C. C. A. 434, was substantially a case of following the New York Court of Appeals in respect of the application of a very important statute as to which great differences of opinion had existed. We conclude that by the law of New York, which this court is bound to follow, the New York and not the Michigan statute, the lex rei sitæ or lex fori, and not the lex loci conditionis, is the law by which the validity and enforceability of this contract is to be adjudicated so far as it is affected by a statute of frauds.

[8, 9] Assuming now the exclusive applicability of the New York statute, it was error to take the case from the jury. The plaintiff's evidence tended to show that the minds of hotel company, acting through its president, and of motor company, operating through its president, vice president, and secretary, had met and united in an agreement that motor company would build and lease what it built to hotel company, in a form agreed upon in every essential and reduced to writing in and by the intended lease prepared for execution by Mr. Robertson.

We express no opinion on this point of fact, further than to say that it was for the jury to pass on. There were some details to be arranged. How unimportant they were (on this record) is shown by the fact that no differences about them have ever been assigned as reasons

[2] It is summarily stated in 39 Cyc. p. 1295, and approved in Story, Conflict of Laws (8th Ed.) §§ 363, 364.

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for refusing to proceed with the matter. This branch of the case should have been given to the jury with instructions in accordance with the rules well stated and summarized in Scholtz v. Northwestern, etc., Co., 100 Fed. 573, 40 C. C. A. 556. See, also, Morse v. Tillotson, 253 Fed. 340, 165 C. C. A. 122, 1 A. L. R. 1485. Cf. Sanders v. Pottlitzer, etc., Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757.

Throughout the trial and in this court, plaintiff has rested upon Mr. Robertson's letter of August 31st, as being the note or memorandum satisfying the statute of frauds.

That this document, if subscribed by motor company's "lawfully authorized agent," was sufficient under the statute, has not been denied; but there was at least a question for the jury as to Mr. Robertson's authority.

Doubtless this gentleman had no power whatever to make the contract here alleged, but that is immaterial. The point is: Did he have authority to make the note or memorandum of August 31st? And the solution of this matter depends upon the authority of the officer or officers of motor company who told him in respect of this particular lease to "fix it up"; or (to paraphrase Mr. Robertson's own testimony) "to prepare as a lawyer or put in legal shape the understanding that existed between" motor company and hotel company. If there was an understanding or mind-meeting and the lessor's attorney was told to put that understanding in legal shape, or words to that effect, we have no doubt that such authority included the power and duty of telling the truth about it, which (if plaintiff's version of the contractual arrangements is the truth) is just what Mr. Robertson did.

Thus we reach the question of the authority of motor company's officers.

[10] Here we need go no further than to indicate adherence to the rule that the president or other general officer of a corporation has power prima facie to do any act which the directors could authorize or ratify. Hastings v. Brooklyn, etc., Co., 138 N. Y. 479, 34 N. E. 289.

It would be idle to recite evidence which, if regiven at another trial, may be quite different in effect by reason of other testimony not now before us. It suffices, therefore, to say that on this record there was enough to take to the jury the question whether Mr. Robertson was authorized to do what he did by officers of motor company themselves acting with authority.

We may mention that no question of damages is presented by this writ; by agreement of counsel such matters were eliminated from the proceedings below.

For these reasons, it is ordered that the judgment be reversed, with costs, and a new trial directed.

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(258 Fed. 331)

SIMONITSCH v. BRUCE et al.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5333.

1. JUDGMENT ⟸423, 429—EQUITABLE RELIEF—GROUNDS.
   It is not ground for equitable interference with a judgment that the defendant by his own act or omission failed effectually to avail himself of a defense, or that the court decided questions of law or fact erroneously.
2. JUDGMENT ⟸407(1)—SUIT TO ENJOIN ENFORCEMENT—ADEQUATE REMEDY AT LAW.
   An injunction will not be granted to restrain enforcement of a judgment at suit of a third person, on the ground that he will be liable over to the defendant therein, where the matter alleged as basis for the injunction would be available to complainant as a defense in an action against him.
3. APPEAL AND ERROR ⟸1241—APPEAL BOND—ESTOPPEL OF SURETY TO DENY PRINCIPAL'S LIABILITY.
   The surety on an appeal bond, conditioned for payment of the judgment, if affirmed, and one indemnifying such surety, are each concluded by the terms of the bond from denying the defendant's liability to pay the judgment.

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Suit by B. Simonitsch against Alexander Bruce, administrator of H. H. Jenkins, deceased, the Northern Trust Company, Eva M. Jenkins, Hallett H. Jenkins, Jr., and L. L. Twichell, guardian of Hallett H. Jenkins, Jr. Decree for respondents, and complainant appeals. Affirmed.

This appeal is taken from a decree sustaining a motion to dismiss the plaintiff's bill and dismissing the case. The relief asked by the bill was an injunction against the collection of a sum adjudged to be due by a judgment of the county court of Cass county, N. D., upon the settlement of the accounts of an administrator, pursuant to a determination of the legal rights of the parties by the Supreme Court of that state. See Macfadden v. Jenkins, 169 N. W. 151. It appears from the plaintiff's bill that a partnership existed under the firm name of Ellsworth & Jenkins, the principal place of business being at Fargo, N. D. The members of the partnership were J. H. Ellsworth and H. H. Jenkins, each having an equal interest, and its chief business was the ownership and management of lands and dealing in mortgage securities. Ellsworth was a nonresident partner, and, pursuant to an agreement to dissolve the partnership and to wind up its affairs, Jenkins had been for several years endeavoring to close up its transactions. Before this was fully accomplished, Jenkins died. Macfadden was appointed as his administrator by the county court of Cass county, N. D. Jenkins died intestate. His heirs were a widow and a posthumous son. A guardian was appointed for the son by the proper probate court. Under the laws of North Dakota a surviving partner succeeds to all of the partnership property in trust for the purpose of liquidation and the interest of the deceased partner in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property. Sections 6425, 8711, 8717, Compiled Laws North Dakota 1913. Notwithstanding these statutory provisions, the administrator proceeded upon the theory that he should manage and dispose of Jenkins' share of the partnership property. Ellsworth was not active in managing the affairs of the firm, the property belonging to it was somewhat incumbered, and the property was not then readily salable. The widow and the guardian agreed that it was for the best

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interests of the estate that a corporation then known as the Ellsworth Jenkins Company, but since known as the Ellsworth Land Company, and hereafter called the Ellsworth Company, be requested and induced to purchase Ellsworth's interest in the partnership property. The stockholders of this Ellsworth Company were the plaintiff, who owned a majority of the stock, the widow of Jenkins, and Macfadden, the administrator of Jenkins. The widow, the child's guardian, and the administrator requested and induced the Ellsworth Company to purchase Ellsworth's share in the partnership property, and he made a transfer of his interest accordingly to the Ellsworth Company. Shortly thereafter the Ellsworth Company entered into negotiations looking to the purchase of the Jenkins interests in the partnership estate.

It is alleged that it was agreed between the administrator, the widow, the guardian, and the Ellsworth Company, represented by the plaintiff in this transaction, that the Ellsworth Company should buy from the administrator what was supposed to be the Jenkins undivided half of the partnership property, and thereafter it should manage all of the property and should account to the Jenkins heirs for any profits accruing, as if the heirs had continued to be the owners of such share. In accordance with this arrangement the administrator sold at private sale to the Ellsworth Company an undivided half of the personal and real property. The Ellsworth Company then continued the management of the property for several years. An accounting by the administrator was then demanded in the probate court, and the widow and guardian made claim that the Ellsworth Company was disqualified from purchasing Ellsworth's share in the partnership assets because Macfadden, the administrator, was also a stockholder and director in the Ellsworth Company. After an order was entered, an appeal was taken to the District Court, and that court decided that Macfadden was liable in a large amount to Jenkins' estate, because all the property the Ellsworth Company had purchased, both from Ellsworth and from Macfadden, as administrator, was, as a matter of law, purchased for the benefit of the estate. This decision was modified and affirmed by the Supreme Court in the case heretofore cited, and a final order has been made by the county court in pursuance thereof, directing Macfadden to pay over to Bruce, his successor in the administration, the amount found due. It is averred that Macfadden is not financially responsible, but that the Northern Trust Company, the surety on his bond as administrator, intends to pay the amount found due to Bruce, as administrator, unless it is enjoined from doing so. After the decision by the District Court against Macfadden, and in order that he might appeal to the Supreme Court, the Ellsworth Company and the plaintiff procured the Northern Trust Company to execute a supersedeas bond on behalf of Macfadden, and indemnified it against loss by reason of its execution of such a bond. Some time before this bill was filed the Ellsworth Company sold and conveyed all its property, accounts, and rights of action to the plaintiff, and the plaintiff assumed all of the debts and obligations of the corporation. The plaintiff avers that Macfadden, while administrator, paid all the claims against the Jenkins estate, except two claims held by the widow, and that he turned over to the new administrator property of the estate much exceeding in value the amount due to the widow on these claims. From the decree dismissing the bill, an appeal is prosecuted by the plaintiff.

Edward Engerud, of Fargo, N. D. (Engerud, Divet, Holt & Frame and Fowler & Green, all of Fargo, N. D., and Ueland & Jerome, of Minneapolis, Minn., on the brief), for appellant.

E. T. Conmy, of Fargo, N. D. (Watson, Young & Conmy, of Fargo, N. D., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge (after stating the facts as above). [1] The foundation of plaintiff's claim, as made in his argument and as

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claimed in his bill, is that the Northern Trust Company, as surety on Macfadden's bond, as soon as it pays the amount found due by the county court's decree, will become subrogated to whatever rights Macfadden has against the Ellsworth Company. It is said that Macfadden was held to be liable to the estate, because he permitted the Ellsworth Company to acquire the property of the estate, and that, if he or his surety must pay its value to the estate, then the Ellsworth Company, as the recipient of the property, is liable to reimburse him. On this hypothesis plaintiff contends that he, as the purchaser of all the property of the Ellsworth Company, and having assumed all of its obligations, will in fact be the one ultimately liable to pay the amount found due to Bruce. He claims an estoppel against the widow, the guardian, and the present administrator, because the widow, the guardian, and the former administrator agreed to and induced the purchase by the Ellsworth Company of the property from Ellsworth and from Macfadden, as administrator, and therefore that the widow, the guardian, and the new administrator may not now assert that that corporation did not lawfully acquire the property. It is obvious that the availability of this defense on the part of Macfadden was a matter for the consideration of the state courts of North Dakota, when Macfadden was called upon to account to the estate, and that the final judgment rendered against him may not be reviewed in this proceeding to determine the correctness of the conclusions on which it was based. No fraud, accident, or mistake is alleged as a ground for avoiding that judgment. It is not a ground for equitable interference with a judgment that a defendant by his own act or omission failed effectually to avail himself of a defense at law, or that the court decided a question of law or fact erroneously. 4 Pom. Eq. Jur. 1361; Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013; Hendrickson v. Hinckley, 17 How. 442, 15 L. Ed. 123; Walker v. Robbins, 14 How. 584, 14 L. Ed. 552; Creath's Administrator v. Sims, 5 How. 192, 12 L. Ed. 111; Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346.

The plaintiff contends that, as he was not a party to that suit, he is not concluded by the adjudication, and that he may assert this claim of estoppel against the widow, guardian, and present administrator, because, as successor of the Ellsworth Company and guarantor of its obligations, he will be obliged to respond to any claim against it.

[2] The theory of plaintiff's bill is that the widow, the guardian, and the new administrator are estopped to claim that there was an invalid purchase by the Ellsworth Company, that that defense has not been availed of by the Ellsworth Company in any litigation to which it was a party, and that it would have been a complete defense for Macfadden, if he had presented it in the suit against him. If this theory is well founded, and it is the only one presented by the bill, then the plaintiff is not entitled to an injunction, because if there shall be a suit brought by Macfadden or his surety against the plaintiff as the successor of the Ellsworth Company he can urge this claim of estoppel, and if it would have been a sufficient defense in the suit against Macfadden it will be a sufficient defense in a suit by Macfadden or his

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successor in interest against the plaintiff. An injunction is not granted as a matter of course, but only in the sound discretion of the court, when necessary to prevent irreparable injury, for which there is no adequate remedy at law, and not to enforce a right that is doubtful, or to prevent an act the injurious consequences of which are doubtful. Parker v. Winnipiseogee Lake Cotton & Woollen Co., 67 U. S. (2 Black) 545, 17 L. Ed. 333; Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 20 Sup. Ct. 628, 44 L. Ed. 777; Parcher v. Cuddy, 110 U. S. 742, 4 Sup. Ct. 194, 28 L. Ed. 312; Bliss v. Washoe Copper Co., 186 Fed. 789, 109 C. C. A. 133; Hunnewell v. Cass County, 22 Wall. 464, 22 L. Ed. 752.

On the theory presented by plaintiff's bill he needs no injunction against the enforcement of the final judgment against Macfadden, in order to protect his rights as the successor to the property and obligations of the Ellsworth Company, so that he may present this defense of estoppel.

[3] There is another reason why plaintiff is not entitled to enjoin the collection of the judgment against Macfadden. He voluntarily indemnified the surety on the appeal bond given by Macfadden when the appeal was taken to the Supreme Court of North Dakota. He thereby agreed that he would pay the judgment against Macfadden, if it was affirmed. The surety on the bond and the plaintiff, as the surety's surety, are each concluded by the terms of the bond from questioning the liability of Macfadden to pay the judgment resulting in that case. Stovall v. Banks, 77 U. S. (10 Wall.) 583, 19 L. Ed. 1036; Wm. W. Bierce, Ltd., v. Waterhouse, 219 U. S. 321, 31 Sup. Ct. 241, 55 L. Ed. 237; Commonwealth of Pennsylvania v. Fidelity & D. Co. (C. C.) 180 Fed. 292; Seymour v. Smith, 114 N. Y. 481, 21 N. E. 1042, 11 Am. St. Rep. 683; Krall v. Libbey, 53 Wis. 292, 10 N. W. 386; Freeman on Judgments, §§ 176, 180; 4 Corp. Jur. 1269. In the case of Stovall v. Banks, supra, the court said:

"It has been argued on behalf of the defendants in error that the decree of the superior court, if admitted, would have been only prima facie evidence against the sureties in the bond. Were that conceded, it would not justify the exclusion of the evidence. But the concession cannot be made. The decree settled that the administrator of the intestate, Alfred Eubanks, held in his hands sums of money belonging to the equitable plaintiffs in this suit, as distributees of the intestate's estate, which he had been ordered to pay over by a court of competent jurisdiction, and the record established his failure to obey the order. Thereby a breach of his administration bond was conclusively shown. Certainly the administrator was concluded; and the sureties in the bond are bound to the full extent to which their principal is bound. A principal in a bond may be liable beyond the stipulations of the instrument, independently of them; but so far as his liability is in consequence of the bond, and by force of its terms, his surety is bound with him. There may be special defenses for a surety arising out of circumstances not existing in this case, but, in their absence, whatever concludes his principal as an obligor concludes him. He cannot attack collaterally a decree made against an administrator, for whose fidelity to his trust he has bound himself."

These conclusions require an affirmance of the decree, and an order to that effect will be entered.

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(258 Fed. 335)

GRATZ v. McKEE et al.*

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5285.

1. TRESPASS ⟸11—CONVERSION OF "REALTY"—STATUTES—"MUSSEL."
The fresh water "mussel," a shellfish capable of locomotion, usually living in the bed of streams partially covered with mud, being a live animal, cannot be deemed part of the "realty," within Rev. St. Mo. 1909, § 5448, allowing treble damages in certain cases for digging up and carrying away any substance or material, being a part of the realty.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Property.]

2. FISH ⟸1—CONVERSION—ACTION FOR VALUE—TITLE—"PEARL FISHING."
In view of Rev. St. Mo. 1909, § 6508, declaring that title to all "birds, fish and game" shall be in the state, and one taking or killing them shall be deemed to have consented that title thereto shall so remain for the purpose of regulation and control, and section 6551, prohibiting pearl fishing at certain times, title to fresh-water mussels taken from a non-navigable river could not be acquired by the owner of the bed of the stream, so as to support an action for the value of the shells; the mussels being animals feræ naturæ, title to which remained in the state, the term "fish" including shellfish, and "pearl fishing" referring to the capture of fresh-water mussels.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fish.]

In Error to the District Court of the United States for the Eastern District of Missouri; John C. Pollock, Judge.

Action by Benjamin Gratz against James S. McKee and others. Judgment for defendants on a directed verdict, and plaintiff brings error. Affirmed.

S. Mayner Wallace and Shepard Barclay, both of St. Louis, Mo., for plaintiff in error.

Frank H. Sullivan, of St. Louis, Mo. (Hoffman & Hoffman, of Sedalia, Mo., and Jones, Hocker, Sullivan & Angert, of St. Louis, Mo., on the brief), for defendants in error.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

CARLAND, Circuit Judge. The plaintiff in error (hereafter plaintiff) sued the defendants in error (hereafter defendants) to recover the value of 307½ tons of mussel shells alleged to have been taken from the lands of plaintiff's assignors in Pemiscot county, Mo., and converted to defendants' use. A second count of the complaint alleged that the shells were a part of the realty and were dug up therefrom. The language used in the second count was for the purpose of bringing the case within the provisions of section 5448, Rev. Stat. Mo. 1909, allowing treble damages in certain cases for digging up and carrying away any substance or material, being a part of the realty. The trial court, at the close of the evidence, directed a verdict for the defend-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing granted November 17, 1919.

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ants, for the reason that the plaintiff had shown no title to the shells in his assignors.

Upon the question of title the evidence tended to show that in the years 1913 and 1914 the St. Louis Union Trust Company owned approximately 1,314 acres of land in Pemiscot county, Mo., in township 20, range 12; that the Himmelberger-Harrison Lumber Company owned 125 acres in the same county, in township 20, range 11; that Little river is a stream about 200 miles in length, flowing in a southwesterly direction through a portion of the above-described lands. The river empties into the St. Francois river, and thus finds its way to the Mississippi river and the Gulf of Mexico. The stream is nonnavigable, except in a very restricted sense. Near Wardell, located near the center of section 25, township 20, range 11, of the lands aforesaid, prior to the years 1913 and 1914, there came or grew in the bed of Little river mussels. The shells of live mussels are valuable for use in making so-called pearl buttons. The mussel is boiled for the purpose of removing the meat from the shell. The fresh water mussel is one of the group of mollusks. It is a shellfish capable of locomotion, but disinclined to exercise this power if its supply of food is sufficient where it is. It sometimes floats upon the water, but usually lives in the beds of streams partially covered with mud. The defendants took from the bed of Little river, at a place where plaintiff's assignors were the owners of both banks of the stream, sufficient mussels to produce the number of tons of shells sued for. The plaintiff, by assignment from the owners of the land, became the owner of the claim for damages arising from the taking of the mussels.

[1, 2] So far as the second count of the complaint is concerned, we are of the opinion that it needs no consideration, for the reason that in no view of the case could the live animal called "mussel" be deemed real estate, any more than a ground hog. The question for decision is: Did the owners of the land through which Little river flowed own these shellfish, and hence their shells, so that the plaintiff, as assignee, can maintain an action for their conversion? It appears that the mussels were in their natural state; that is, the owners of the land through which the stream flowed had taken no measures to reduce them to private ownership, nor were they planted where they were found by such owners. As Little river is nonnavigable, we assume that the owners of both banks thereof also owned the bed of the stream. The flowing waters of the stream, however, were public waters, and fish, whether swimming or shell, found therein, could not become, under the laws of Missouri, the subject of private ownership. Sections 6508 and 6551, Rev. Stat. of Missouri 1909, read as follows:

Section 6508: "The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the state of Missouri, not now held by private ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the state of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or

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killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

Section 6551: "It is hereby declared unlawful for any person to engage in what is commonly known as 'pearl fishing' in any of the waters of this state at any time during the months of March, April, May and June. Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense."

At the time section 6508 was enacted neither plaintiff"s assignors, nor any other private individual or corporation, had legally acquired an ownership of the mussels in question. It is no doubt true that the above sections were enacted for the purpose of regulating the capture and sale of the animals therein mentioned. We also understand that "pearl fishing," as used in section 6551, refers to the capture of fresh-water mussels such as are described in this case. It therefore appears that the state of Missouri claims the right of regulating the capture of mussels in the public waters of said state. To hold that plaintiff's assignors owned the mussels in controversy would be to decide that said assignors had the exclusive right of fishing in the waters of Little river, where these mussels were found. Such a grant would not be presumed, in the absence of express words, in a grant conveying the exclusive right of fishery. It is very doubtful, also, as to whether any such grant would be valid under the Constitution and laws of Missouri. In the case of McKenzie's Executors v. Hulet, 4 N. C. 613, it was decided that a grant of land covered by an arm of the sea only at high water, would entitle the grantee to an action of trespass for taking oysters from the rocks within the grant. The court also said:

"The right of taking fish in the sea, or the arms thereof, belongs to every one as a common of piscary; but even this may be restrained, where an individual hath gained exclusive property. Hale, De Jure Maris, 11. And this may be acquired by grant or prescription. Ibid. 43. But it being considered as a royalty, it would not pass without special and express words." 2 Bl. 39.

As we understand the record, the grant to plaintiff's assignors did not mention Little river or the waters thereof; neither does it appear from the report of the case above cited what the words of the grant were in that case. The record shows that the lands of plaintiff's assignors were first granted by the United States to the state of Missouri by the act of Congress approved September 28, 1850 (9 Stat. 519, c. 84 [Comp. St. §§ 4958–4960]), relating to swamp lands, then by the state to the county of Pemiscot, from which plaintiff's assignors obtained their title. We find no reason for holding that plaintiff's assignors had by grant or otherwise an exclusive right of fishery in the waters of Little river at any point. These mussels cannot be separated from the waters of Little river, so far as their ownership is concerned. It is true they were found in the bed of the stream, but they could not live without the stream, and plaintiff's assignors could have no exclusive ownership in them independent of the ownership of the water in the stream. The elementary authorities, in our judgment, sustain the views above expressed, and seem to be in line with the statute of

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the state of Missouri in regard to the public waters of said state. The term "fish" includes the different kinds of shellfish, such as oysters, clams, and lobster. Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57; Caswell v. Johnson, 58 Me. 164; note, 60 L. R. A. 516; 11 R. C. L. 1015. Fish, generically speaking, on account of their migratory character and want of a fixed habitat, are classified as animals feræ naturæ. Their ownership while they are in a state of freedom is in the state, not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common, and the ownership thereof may not be claimed by any particular individuals. 11 R. C. L. 1015, 1016; State v. Heger, 194 Mo. 711, 93 S. W. 252; State v. Weber, 205 Mo. 36, 102 S. W. 955, 10 L. R. A. (N. S.) 1155, 120 Am. St. Rep. 715, 12 Ann. Cas. 382.

The difference in the locomotive powers of swimming fish and shellfish, however, justifies a distinction as to their ownership. In their natural state shellfish, like swimming fish, are classified as feræ naturæ, and their ownership is vested in the state in its sovereign capacity. 19 Cyc. 988, B; R. C. L. 1017. Oysters and clams, however, which are planted where they do not naturally grow, and the location of which is marked by posts or otherwise, are the subjects of private ownership. R. C. L. 1018. In Parker v. People, 111 Ill. 588, 53 Am. Rep. 643, the Supreme Court of Illinois said:

"From the wild and wandering nature of fish, they are not, nor can they be, the subject of ownership in running streams, like animals and fowls which have been domesticated. The nature of fish impels them periodically to pass up and down streams for breeding purposes, and in such streams no one, not even the owner of the soil over which the stream runs, owns the fish therein, or has the legal right to obstruct their passage up or down, for to do so would be to appropriate what belongs to all to his own individual use, which would be contrary to common right, and all having a common and equal ownership, nothing short of legislative power can regulate and control the enjoyment of this common ownership."

In Peters v. State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114, the Supreme Court said:

"Fish in streams or bodies of water have always been classed by the common law as feræ naturæ, in which the riparian proprietor, or the owner of the soil covered by the water, even though he may have the sole and exclusive right of fishing in said waters, has, at best, but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other waters."

The above language of the Supreme Court of Tennessee was fully approved in State v. Theriault, 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695.

We are of the opinion that, under the facts of this case, the mussels in controversy were animals feræ naturæ, and no private property existed in regard to them while they remained in a state of nature. From the earliest traditions, the right to reduce animals feræ naturæ to possession has been subject to the control of the law-giving power. Geer v. Conn., 161 U. S. 519–522, 16 Sup. Ct. 600, 40 L. Ed. 793. Speaking generally, and without reference to the rights and legislation of Missouri, the defendants, by killing the mussels and reducing them

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to possession, obtained title to the same. 3 C. J. 18. The plaintiff, however, invokes the rule of the common law that, where title to animals feræ naturæ is obtained by taking possession thereof, the taking must not be wrongful and if the taking is effected by one who is at the moment a trespasser, no title to the property is created in him but it vests in the owner of the soil. 3 C. J. 20. And as it appears in evidence in this case that the mussels were taken and boiled on the lands of plaintiff's assignors, the title to the same vested in the plaintiff as the defendants were mere trespassers. We are of the opinion, however, that, whatever might be the effect of the rule stated in general, we think that the legislation of Missouri as hereinbefore quoted would vest the title of the killed mussels in the state, and not in the plaintiff. Plaintiff has cited some English decisions as to the right of fishery in the waters of England, but the difference as to what are private and public waters in England and the United States make the cases cited inapplicable. The public waters of England, so far as the right of fishing is concerned, are separated from private waters by the ebb and flow of the tide. This rule has never obtained in this country, either as to fishing or as to the navigability of streams. In this country, if a stream is navigable in fact, it is so in law.

Our judgment is that the trial court was right in directing a verdict for the defendants, and that the judgment below should be affirmed.

It is so ordered.

(258 Fed. 339)

THOMPSON et al. v. BOMAR et al.*

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5276.

ATTORNEY AND CLIENT ⇐141—FEES—ALLOWANCE.

Where, in a suit in which the minority stockholders were successful, the final decree provided that the compensation fund reserved should be apportioned between the various solicitors, *held*, that the counsel who first protested against the action of the majority and brought suit in the state courts were entitled to compensation for their services in connection with such suit, though the litigation in which the minority shareholders were finally successful was in the federal courts, so that such counsel were entitled to $45,600 out of the entire fund of $104,299.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

William B. and Ford W. Thompson appeal from a decree in favor of Anna E. Bomar and others, assessing attorney's fees among counsel for the minority stockholders of the Missouri-Edison Electric Company and others in the case of Jones v. Missouri-Edison Electric Co. et al. Reversed and remanded, with instructions.

Ford W. Thompson and Paul Bakewell, both of St. Louis, Mo., for appellants.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied October 30, 1919.

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Daniel G. Taylor, of St. Louis, Mo. (Jacob Chasnoff and George C. Willson, both of St. Louis, Mo., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree of the District Court, which determined the distribution of $104,299.15 among the counsel for the minority stockholders of the Missouri-Edison Electric Company, according to the value of their respective services in the litigation which those stockholders have had with the Union Electric Light & Power Company and others, which first appeared in this court in 1905 under the title of Jones v. Missouri-Edison Electric Co. et al., 144 Fed. 765, 75 C. C. A. 631, and which resulted in a final decree in their favor in the court below for $609,400.80 in 1916. The purpose of that litigation was to avoid the practical consolidation of the Missouri-Edison Electric Company, a corporation, together with the Union Electric Light & Power Company, another corporation, into the Consolidated Union Electric Light & Power Company, or to secure and recover from the defendants the value of the stock of these minority stockholders. This litigation was commenced by Mr. W. B. Thompson on behalf of his client, Mr. Frank A. Ruf, and all other minority stockholders similarly situated, on September 8, 1903. On that day at the meeting of the stockholders of the Edison Company, he protested on behalf of his client against the proposed consolidation, and on the same day brought a suit for Mr. Ruf, the owner of 1,160 shares of the preferred stock of the Edison Company, to prevent the consolidation by an injunction, and for other appropriate relief. That suit was brought in one of the state courts in the state of Missouri. An amended complaint therein was filed in November, 1913, depositions were taken, and it was prosecuted until after the decision of this court on April 17, 1916, overruling the demurrer to the complaint in the subsequent suit brought by Mr. Jones. After that decision Mr. Ruf dismissed his suit in the state court and intervened in the Jones suit in the court below. About the time Mr. Thompson commenced the Ruf suit, Mr. Morgan Jones, the owner of 1,002 shares of the preferred stock of the Edison Company, employed Mr. Eleneious Smith of St. Louis, and Mr. David T. Bomar and his brother, J. E. Bomar, of Texas, to examine his rights in this matter, and to take such action as they should advise in view of the practical consolidation, which the majority of the stockholders of the Edison Company were effecting. Messrs. Smith and Bomar, or one of them, consulted with Thompson immediately after he commenced his Ruf suit, and he gave them copies of his pleadings in that case and all the facts and law he knew, with reference to the rights of these minority stockholders. In April, 1904, after repeated consultations between Mr. W. B. Thompson and counsel for Mr. Jones, the latter brought the Jones suit in the federal court. The theory of the latter suit was the same as was that of the suit brought by Mr. Thompson for Ruf in September, 1903. Each suit rested upon the same facts and the same law, and each suit

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was brought by the plaintiff therein on behalf of himself and all others similarly situated.

Mr. W. B. Thompson and his son, Mr. Ford W. Thompson, had law offices and were practicing law in the city of St. Louis in 1903, and they are still so doing, and from the commencement of the Ruf suit to the entry of the final decree in the Jones suit they were active and efficient in the conception, commencement, and conduct of this litigation to its successful result. From the early autumn of 1903, when they commenced the Ruf suit, until the final decree, they and the solicitors for Mr. Jones consulted together, searched out, and proved the necessary facts, and demonstrated the law which brought them success. In the autumn of 1904 Mr. Smith invited Mr. Ford W. Thompson into the Jones suit, and he accepted the invitation and served therein. In the course of the litigation many solicitors were employed on behalf of Mr. Jones for portions of the time, but the Thompsons served from its beginning to its end.

By the final decree, and pursuant to the agreement of all parties and their solicitors, there was retained in the court below for solicitors' fees, in addition to the sum of $4,209.15 that had been paid by Mr. Jones and some of the interveners to his solicitors, and in addition to the sum of $4,320, that had been paid by Mr. Ruf to his solicitors, the Thompsons, $95,770, making an aggregate of $104,299.15, which was agreed to be the fair and reasonable compensation for the services of all the solicitors in the case and the court in its final decree further found:

"That counsel for complainant and interveners have agreed that the amount retained in court for solicitors' fees and said sum of $8,529.15 shall be apportioned between William B. and Ford W. Thompson, Elenelous Smith, Douglas W. Robert, and David T. Bomar, according to the amount and value of the services by them herein rendered, respectively."

No controversy arose between Messrs. Smith, Robert, and Bomar under this agreement and finding as to the relative amount and value of the services rendered as between themselves, nor as to their rights as against each other to share equally in the funds, but they argued that the amounts and values of their services were such that they were entitled to 75 per cent. and the Thompsons to 25 per cent. of the fund, while the Thompsons insisted that the services of Messrs. Smith, Robert, and Bomar were relatively of no greater value than their own, and that a just distribution of the fund would send 50 per cent. of it to them and 50 per cent. of it to the Thompsons. This controversy was referred to Hon. F. L. Schofield, the special master, who made a report, which the court below confirmed, and upon which it founded the decree which is here challenged by the appeal of the Thompsons.

In reaching his conclusions the master divided the time during which the services of counsel were rendered into three periods and found: (1) The percentage of the amount and value of all the services rendered during the entire litigation that was rendered in each of these periods; and (2) the percentage of all the services rendered in each period that was rendered by the Thompsons, on the one hand, and by the other solicitors, on the other.

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His first period extends from the employment of counsel in September, 1903, until the overruling of the demurrer to the complaint in the Jones suit by this court on April 17, 1906, and he found that 28 per cent. of the amount and value of the services of all the solicitors was rendered in this period, and that the Thompsons rendered 18 per cent. of this 28 per cent. and the other solicitors rendered 82 per cent. thereof.

The second period extends from April 17, 1906, to April, 1913, and includes the services rendered in procuring the decisions of this court disclosed in its opinions in 199 Fed. 64, 117 C. C. A. 442, and 203 Fed. 945, 122 C. C. A. 247, and he found that 38 per cent. of the amount and value of all the services of all the solicitors was rendered in this period, and that the Thompsons rendered 37 per cent. of this 38 per cent. and the other solicitors rendered 63 per cent. thereof.

His third period extends from the end of the second period to the entry of the final decree, and includes the services rendered in procuring the decisions of this court set forth in its opinion in 233 Fed. 49, 147 C. C. A. 119, and the final decree pursuant thereto; and he found that 34 per cent. of the amount and value of the services of all the solicitors was rendered in this period, that the Thompsons rendered 31 per cent. of this 34 per cent. and the other solicitors 69 per cent. thereof.

At the end of his report the special master added the statement that in his opinion the Thompsons were not entitled to receive credit in the accounting for services performed by Mr. W. B. Thompson in the preparation of the pleadings and in the conduct of the Ruf Case in the state court, that he had given them no credit therefor, and that if he was in error in this conclusion the Thompsons would be entitled to a larger proportion of the compensation set apart for the first period.

The question in this case is a narrow one. It is: What proportion of the amount and value of all the services of all the solicitors engaged in the litigation, which resulted in the final decree in the Morgan Jones suit, did W. B. and Ford W. Thompson render? For it goes without saying, that they ought to receive the same proportion of the fund of $104,299.15 reserved to pay for those services. The length of time this litigation continued, the importance of some of the questions of law argued and adjudged, the multitude of the issues of law involved, the vast volume of evidence adduced and of briefs and arguments presented in the long course of the litigation, make it impossible to state or review them within the permissible limits of an opinion of this court. Nor would such a review serve any good purpose, for there is no question of law involved now, and the decisions of the questions of fact can never form precedents for future decisions, because no later case will present the same or similar facts. Moreover, the right answer to the question at issue is not susceptible to such an exact determination or demonstration as is an answer to a solvable mathematical problem. It is, after all the evidence, the arguments, and briefs have been read, analyzed, and thoughtfully considered, a matter of opinion or judgment. In view of this situation, no attempt will be made to state the facts or arguments which condition the conclu-

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sion in this case. Suffice it to say that each of the members of this court, after a thoughtful and careful examination of the evidence, briefs, and arguments, without consideration or discussion with each other, concluded, and at the first consultation reported, that in his opinion the Thompsons ought to receive a certain amount out of the $104,299.15, and neither of these amounts differed more than $2,500 from either of the others. Subsequent conferences, discussions, and deliberations have resulted in these conclusions of the court.

The entire litigation, from September, 1903, when W. B. Thompson filed his complaint in the Ruf suit until the final decree in the Jones suit, was one case, upon one cause of action, the case of the minority stockholders of the Edison Company against the majority stockholders thereof and the Consolidated Union Company they used to deprive the minority of the real value of their stock. Ruf and Jones each brought his suit, not only for his own benefit, but also for the benefit of all the other minority stockholders similarly situated. W. B. Thompson first conceived and commenced this litigation on behalf of his client, Ruf, on September 8, 1903. On that day, at the meeting of the stockholders of the Edison Company, he protested for Ruf against the passage of the resolution for the consolidation, and filed the Ruf complaint for an injunction against this consolidation and for other appropriate relief. On October 6, 1903, he had prepared his amended petition in that suit. On October 13, 1903, Mr. Bomar and Mr. Jones obtained from him a copy of that amended petition. On November 11, 1903, Mr. Thompson filed Ruf's amended petition. During the time between October 13, 1903, and the final decree in 1916, the other solicitors in this litigation consulted with the Thompsons and worked together with them, gathering proof of the facts and legal precedents, to sustain this case. On April 1, 1904, Jones' solicitors filed his complaint in the court below. A demurrer was filed and sustained in the state court to the complaint of Ruf, and a demurrer was filed and sustained in the United States District Court to the complaint of Jones. From the order sustaining the demurrer in the latter case an appeal was taken to this court. Mr. Smith and Mr. Ford W. Thompson together prepared the brief, and Mr. Smith opened and Mr. Ford W. Thompson closed the argument on that appeal in this court, and this brief and these arguments resulted in the reversal of the order below and the declaration of the equitable principles upon which the case of the minority stockholders was won.

It is by no means certain that Mr. Jones would ever have brought his suit, or taken any effective steps toward bringing it, if he and his solicitors had not been awakened and encouraged to do so by Mr. W. B. Thompson's protest, his suit for Mr. Ruf, his knowledge of facts, and his confidence in the law, which he communicated to Mr. Jones and his solicitors. It was Mr. W. B. Thompson who first conceived, commenced, and led in the beginning of this litigation, while Jones and his solicitors followed.

Mr. Ruf had 1,160 shares and Mr. Jones had 1,002 shares of the stock of the Edison Company, and they contributed to the fund for the compensation of all the solicitors $107.50 per share. As Ruf had

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more shares than Jones, he contributed more to the fund. Ruf had paid the Thompsons $4,320 on account of their services in the Ruf and the Jones suits before the agreement and decree regarding the compensation fund were made, and the Thompsons contributed $4,320 to the fund of $104.299.15. Jones and some of the interveners had paid $4,209 to their solicitors, and those solicitors contributed that amount to this fund. By the final decree Ruf received $220,632 and Jones $190,580.40. So it appears that the interest of Mr. Ruf, the client of the Thompsons in the litigation, and his contribution to the compensation fund, were not less than the interest and the contribution of Mr. Jones and the interveners with him. The finding of the court in the final decree was that this compensation fund should "be apportioned between Wm. B. and Ford W. Thompson, Eleneious Smith, Douglas W. Robert, and David T. Bomar, according to the amount and value of the services by them herein rendered, respectively." The record in this case discloses the fact that the master, in his consideration and determination of the proportions of the fund which Messrs. Smith, Robert, and Bomar had received under this agreement and finding, credited them with the services of Mr. J. E. Bomar and Mr. Edward Robert, who rendered services for the minority stockholders during the litigation, although their names are not mentioned in the agreement or finding, and in view of the facts which have now been recited, and upon a consideration of all the evidence, no doubt remains that the master and the court fell into an ereror in their refusal to consider or give any credit to the Thompsons in this accounting on account of the amount and value of the services of Mr. W. B. Thompson and Mr. Ford W. Thompson in the Ruf suit. It is clear to our minds that it was the intention of the counsel who made the agreement of apportionment that all the services of all the counsel who served in this litigation, including the services of Messrs. W. B. and Ford W. Thompson in the Ruf suit, should be considered in the accounting and apportionment, and when this agreement and the finding of the court in which it is embodied are read in the light of the circumstances surrounding the parties when they made it, this intention is clearly expressed in the contract.

The crucial period in this litigation was the first period. Then it was that all was at stake. After that the only question was how much should be recovered. The extent of the fiduciary relation and liability of the majority stockholders and those claiming under them to minority stockholders was not as well known and as clearly set forth in the decisions of the courts in 1903 as it is in 1919. The trial courts in this litigation held that the complaints in the Ruf and Jones suits stated no cause of action. The product of the ability, learning, and labor that persuaded a reversal of that conclusion and established the law which assured a recovery for these minority stockholders was little, if any, less valuable to them in this case than all the services of counsel subsequently rendered. Nor, in view of the facts which have been recited, and especially of the facts that W. B. Thompson first conceived and commenced the litigation, that he led where others followed, that Smith and Bomar constantly counseled and labored with

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him and with his son throughout this first period, that they never succeeded in obtaining a decision that their suit could be maintained until Mr. Smith and Mr. Ford W. Thompson together, after each searching and reviewing the authorities and then combining their knowledge and their ability, prepared the brief and made the arguments which gave them the decision of this court of April 17, 1906, can the conviction be resisted that the amount and value of the services of the Thompsons, during this period, were equal to those of Mr. Smith and the Bomars. A careful study of the records, briefs, and arguments relating to the two other periods were necessary and were made before reaching these conclusions, and the other requisite changes in the apportionment of the fund that in the opinion of the court are deemed just.

The sum of the whole matter is that this court is of the opinion that the following changes in the percentages and proportions used by the special master and the court below should be made: First, that the percentage of the amount and value of the services of all the solicitors rendered in the first period should be 45, instead of 28, and that the percentage of this 45 per cent. rendered by the Thompsons during this period should be 50 per cent., instead of 18 per cent., making the Thompsons' share of the compensation fund for their services during the first period $23,467.30; second, that the percentage of the amount and value of the services of all the solicitors rendered in the second period should remain 38 per cent., and that the percentage of this 38 per cent. rendered by the Thompsons during this period should be 42 per cent., instead of 37 per cent., making the Thompsons' share of the compensation fund for their services during the second period $16,646.14; third, that the percentage of the amount and value of the services of all the solicitors rendered in the third period should be 17 per cent., instead of 34 per cent., and that the percentage of this 17 per cent. rendered by the Thompsons should remain 31 per cent. as it is, making the Thompsons' share of the compensation fund for their services during the third period $5,496.56, so that the Thompsons' share of the entire fund of $104,299.15 shall be $45,610.01, while the share of all the other solicitors shall be $58,689.14.

Let the decree below be reversed, and let this cause be remanded to the court below, with instructions to enter a decree in accordance with the views expressed in this opinion.

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(258 Fed. 346)

MISSISSIPPI VALLEY TRUST CO. v. RAILWAY STEEL SPRING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1919.)

No. 5131.

1. INJUNCTION ⟸157 — PRELIMINARY INJUNCTION — ORDER—IRREGULARITY—STATUTE AND EQUITY RULE.

In suit to marshal the assets of a railway company and distribute them, and for injunction restraining the company and others from interfering with, transferring, etc., any part of the railroad's assets, wherein receiver was appointed, order directing payment of interest by receiver on certain notes held by banks, and also enjoining such payees from selling or attempting to sell any collateral securing the notes, *held* irregular and invalid, as not conforming to Comp. St. § 1243a, or to new equity rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix).

2. APPEAL AND ERROR ⟸100(2)—ORDER DENYING PETITION TO VACATE INJUNCTION—JUDICIAL CODE.

Under Judicial Code, § 129 (Comp. St. § 1121), order denying petition to vacate a preliminary injunction was appealable.

3. INJUNCTION ⟸163(1)—PRELIMINARY INJUNCTION—PETITION TO VACATE—DENIAL.

Order denying trust company's petition to dissolve preliminary injunction restraining it from disposing of collateral securing notes of railroad, whose assets a steel spring company was seeking to marshal and have distributed, a receiver having been appointed, *held* not necessarily erroneous, despite irregularities in the order to the receiver to pay interest on the notes, which order embodied the preliminary injunction.

4. INJUNCTION ⟸175—PRELIMINARY INJUNCTION—APPLICATION FOR DISSOLUTION—PRACTICE.

It is well-recognized practice, on application for dissolution of restraining orders or preliminary injunctions on the ground of irregularities, to deny such petition if at the time of the hearing the court is of opinion such restraining order or preliminary injunction should issue, in view of all the facts and circumstances then existing.

5. CONTRACTS ⟸101(1)—LOCAL LAW.

The validity of a transaction whereby a trust company became the holder of a railroad's bonds as security for the railroad's note, and the status of the trust company as such holder, are to be determined by the law of the state of Missouri; the transaction having been a Missouri transaction.

6. RECEIVERS ⟸74—CONTROL OF PROPERTY—INTERFERENCE.

Property in the hands of a receiver appointed by a court may not be interfered with, even to carry out private agreements, contracts, or trusts.

7. RECEIVERS ⟸77(1)—CONTROL OF PROPERTY BY COURT—JURISDICTION OF LIEN DISPUTES.

A court, administering property already in its hands through a receivership, may properly draw to itself all disputes as to liens and other rights upon or pertaining to such property.

8. RECEIVERS ⟸77(4)—PROPERTY PLEDGED—INJUNCTION AGAINST SALE OF COLLATERAL—JURISDICTION.

In view of the controlling Missouri rule, District Court, on March 1, 1918, when it denied petition of trust company to vacate temporary injunction against its disposing of a railroad's bonds pledged as collateral to secure the note of the railroad, which was in the hands of a receiver for the marshaling of assets and their distribution at the suit of a steel spring company, *held* to have had jurisdiction to issue an injunctional or-

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der against the trust company, restraining it from the sale of the collateral, so that the order denying the petition to vacate the prior injunction was proper.

Appeal from the District Court of the United States for the Eastern District of Missouri; William C. Hook, Judge.

Petition by the Mississippi Valley Trust Company against the Railway Steel Spring Company and others, to vacate an order in the Steel Spring Company's suit against a railway for marshaling and distribution of assets. From an order denying the petition, petitioner appeals. Affirmed.

Loomis C. Johnson, of St. Louis, Mo. (J. D. Johnson, Breckenridge Jones, and A. H. Roudebush, all of St. Louis, Mo., on the brief), for appellant.

Joseph M. Bryson, of St. Louis, Mo., for appellee, Schaff.

C. S. Burg, of St. Louis, Mo., for appellee Missouri, K. & T. Ry. Co.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

BOOTH, District Judge. This is an appeal from an order, made after a hearing, denying a petition by the trust company to set aside a restraining, or injunctive, order, theretofore issued against it without a hearing. The salient facts are as follows:

September 27, 1915, two creditors' bills were filed in the court below against the Missouri, Kansas & Texas Railway Company. One of these bills was filed by the Railway Steel Spring Company. The bill prayed for a marshaling of the assets of the railway company and a distribution of the same, and also for an injunction against the railway company "and all persons, firms, and corporations whatsoever and wheresoever located, situated or domiciled, from interfering with, transferring, selling, or disposing of, attaching, levying upon, or in any manner whatsoever disturbing any part of the railroad's assets, moneys, and property now or hereafter in the possession of any receiver appointed in this cause." On the same day, answer was filed by the railway company admitting the allegations of the bill. A receiver was thereupon appointed to take possession and administer all of the properties and assets of the railway company. In the order appointing the receiver was the following provision:

"The Missouri, Kansas & Texas Railway Company and the officers, directors, agents, attorneys, and employés of said railway company, and all other persons claiming to act by virtue of or under said railway company, and all other persons, firms, and corporations whatsoever, and wheresoever situated, located, or domiciled, be and they are hereby restrained and enjoined from interfering with, attaching, levying upon, or in any manner whatsoever disturbing any portion of the assets, goods, moneys, and property and premises of which receiver is hereby appointed, or from taking possession of, or in any way interfering with, the same or any part thereof, or from interfering in any manner to prevent the discharge by said receiver of his duties or the operation of said property and premises under the orders of this court."

Among the mortgages upon property of the railway company was the consolidated mortgage, being, in general, a fourth lien upon the properties. Under this mortgage, bonds in the amount of $30,292,000

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were outstanding; $24,516,000 of these were in the hands of the Central Trust Company, pledged to secure $19,000,000 of two-year gold notes of the railway company under a collateral trust agreement dated April 29, 1913. Of the bonds outstanding, but not thus pledged to the Central Trust Company, $250,000 of said bonds were held by the Mississippi Valley Trust Company to secure a note of the railway company, amount $125,000, due May 1, 1916; $800,000 held by the Mercantile Trust Company, to secure a note, amount $240,000; $250,000 held by the National Bank of Commerce, to secure a note, amount $125,000; $600,000 held by Speyer & Co., to secure a note, amount $243,750. The Mississippi Valley Trust Company also held $100,000 of the two-year gold notes above mentioned.

October 23, 1915, the receiver presented a petition to the court, setting forth among other things the facts above stated, and that the interest on the notes held by the Mississippi Valley Trust Company, Mercantile Trust Company, National Bank of Commerce, and Speyer & Co. would presently fall due. He also set forth in his petition that upon default upon maturity of said notes the holders might under the terms of their contracts sell the bonds held as security, and that in some one or more of the contracts it was provided that the appointment of a receiver, or insolvency, should immediately effect the maturity of said notes. Receiver prayed that he be allowed to pay the interest on the notes held by the four companies above mentioned, and further prayed that said four companies and each of them be enjoined until the further order of the court from selling or attempting to sell, or otherwise dispose of, any of the collateral respectively held by them.

Upon said petition the court made its order, October 23, 1915, directing the payment of interest on the notes held by the four companies above mentioned, and included in said order the following:

"The Central Trust Company of New York, as trustee in the collateral agreement dated April 29, 1913, and the National Bank of Commerce, of St. Louis, the Mercantile Trust Company, of St. Louis, the Mississippi Valley Trust Company, of St. Louis, and Speyer & Co., of New York, as payees and holders of the notes hereinabove referred to, be and each of them are hereby enjoined until the further order of this court from selling or attempting to sell, or otherwise dispose of, any of the collateral referred to in the above and foregoing petition and respectively held by them."

On the 1st of November, 1915, the receiver transmitted to the Mississippi Valley Trust Company the payment of interest on the note held by it, and stated in the letter of transmittal:

"This payment is made pursuant to order of the court dated October 23, 1915, a certified copy of which is herewith inclosed."

Attention was also called in the letter to the last clause of the order, enjoining the sale of the collateral.

March 31, 1917, Mississippi Valley Trust Company filed its petition to vacate the order of October 23, 1915. In its petition the trust company stated:

"Your petitioner, Mississippi Valley Trust Company, appearing herein only for the purpose of this motion and strictly limiting its appearance thereto, states: * * *

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"(7) Your petitioner respectfully states that it had neither notice nor knowledge of the filing of the said petition of the said receiver on the 23d day of October, 1915; that it had neither notice nor knowledge of the hearing on said petition; that neither at the time of the entry of said order, nor for a long time thereafter, had it the power or the intention to sell the said bonds aforesaid; that, the premises considered, the said injunction or restraining order, having been made and entered without notice to your petitioner as aforesaid, was made and entered improvidently, in violation of the provisions of rule 73 of the Rules of Practice in Equity [198 Fed. xxxix, 115 C. C. A. xxxix] and further of section 718 of the Revised Statutes of the United States [Comp. St. § 1243a], and without jurisdiction in this court to make and enter the same; and that because thereof your petitioner unjustly and unlawfully is deprived of its rights and the power to assert the same."

The prayer of the petition was as follows:

"Wherefore, your petitioner prays that said order made and entered October 23, 1915, may be vacated and set aside, and by an order entered of record be declared to be void and of no effect."

After full hearing the court, on the 1st of March, 1918, filed the following order:

"Upon consideration of the petition of the Mississippi Valley Trust Company for the vacation of the order of October 23, 1915, restraining the sale of certain collateral, and of the briefs for the petitioner and the briefs and affidavits for the receiver and the railway company, it is ordered that the petition be and it is hereby denied."

The present appeal is from the last-named order.

Among the questions raised by the appeal are the following:

(1) Was the original order of October 23, 1915, irregular and invalid?

(2) If so, does the order of March 1, 1918, of necessity fall with the original order?

(3) Or was the order of March 1, 1918, valid and justified?

[1, 2] 1. It is plain from the record that the order of October 23, 1915, did not conform to the provisions of the Act of October 15, 1914, c. 323, § 17, 38 Stat. 737 (Comp. Stat. 1243a), or to new federal equity rule 73. Many irregularities are pointed out by counsel for appellant: Lack of notice of hearing to the appellant trust company; lack of opportunity to be heard; that the trust company was not a party to the suit in which the receiver had been appointed; that no bond was required; that the order did not define the injury, and state why it was irreparable; that no definite time was fixed for the continuance of the order.

Some of these objections proceed on the assumption that the order of October 23, 1915, was a restraining order; others, that it was a preliminary injunction. It has some of the features of both, and lacks some. But, whatever its precise nature, it failed in several particulars to conform to the statute and the rule above cited.

Without discussing at length its exact character, we shall assume that it was a preliminary injunction. The order of March 1, 1918, was therefore appealable. Section 129, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. § 1121]); Western Union Tel. Co. v. Trust Co., 221 Fed. 545, 137 C. C. A. 113; Davis v. Hayden, 238 Fed. 734, 151 C. C. A. 584. In view of the irregularities accom-

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panying the issuance of said order of October 23, 1915, we are of opinion that, if timely and proper application had been made by the trust company for the vacation of said order, either the irregularities would have been cured, if curable, or the order would have been vacated.

[3, 4] 2. Was the order of March 1, 1918, necessarily erroneous, in view of the irregularities attending the order of October 23, 1915?

It is claimed by the appellees that the receiving of the interest by the trust company November 1, 1915, with notice that the interest was paid under and by virtue of the order of court which contained the injunctional order, a copy of which was inclosed to the trust company, and the retention by it of the interest so transmitted, was a waiver.

It is also contended by the appellees that the petition of the trust company filed March 31, 1917, and praying for the vacation of the order of October 23, 1915, is of such character that it waived any irregularities attending the last-mentioned order. The trust company stated in its petition that it entered an appearance solely for the purpose of the motion to vacate the order of October 23, 1915, yet it nevertheless proceeded to attack the validity of that order, not only for irregularities attending the making of the same, but also as to the merits, and it has followed the same course in this court upon appeal. It might well be held, under the circumstances, that the trust company had waived its right to object to the order of October 23, 1915, on the ground of irregularities. St. Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; Western Loan & Savings Co. v. Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; Thames & Mersey Ins. Co. v. U. S., 237 U. S. 19, 24, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087. See, however, Salt Lake City v. Smith, 104 Fed. 457, 471, 43 C. C. A. 637; Southern Pac. Co. v. Fruit Co., 191 Fed. 101, 111 C. C. A. 581. However this may be, it seems certain that the trust company, by attacking the order of October 23, 1915, upon the merits, has at least opened the door to a discussion of the merits of an injunctional order, viewed not merely from the standpoint of facts existing on October 23, 1915, but viewed from the standpoint of facts as they appeared to the court at the time of the filing of the petition by the trust company, and at the time of the filing of the order denying said petition, viz. March 1, 1918.

It would be a useless procedure for the court to set aside the order of October 23, 1915, for irregularities, and at once issue a like order based upon the merits. It is a well-recognized practice, upon applications for dissolution of restraining orders or preliminary injunctions on the ground of irregularities, to deny such petition, if at the time of the hearing the court is of opinion that such restraining order or preliminary injunction should issue in view of all the facts and circumstances then existing. 22 Cyc. Law & Proc. 978; 1 Joyce on Injunctions, § 291a; Warren v. Pim, 65 N. J. Eq. 36, 55 Atl. 66; Savoie v. Thibodeaux, 28 La. Ann. 169; Henderson v. Maxwell, 22 La. Ann. 357.

We reach the conclusion, therefore, that the order of March 1, 1918, was not necessarily erroneous, although the order of Octo-

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ber 23, 1915, would probably have been set aside for irregularity, if timely and proper application had been made.

[5-8] 3. This brings us to the consideration of the merits of the question, whether upon all the facts and circumstances existing on March 1, 1918, the court had jurisdiction to issue, and might properly issue, an injunctional order against the trust company, restraining it from the sale of the collateral in question.

The situation on March 1, 1918, had numerous features which were absent from the situation on October 23, 1915. The Central Trust Company on November 13, 1915, had filed its bill for foreclosure of the consolidated mortgage. The railway company had answered, asking that those parties who held consolidated bonds as collateral to notes should be enjoined from selling the collateral, and asking further that the holders of such bonds, including the Mississippi Valley Trust Company, be made parties to the consolidated foreclosure suit. In its answer the railway company had also raised the question as to the legal status of the consolidated bonds in the hands of those parties who held them as collateral to notes, including those held by the Mississippi Valley Trust Company. It was alleged that said bonds had never been sold by the railway company and had never passed out of its possession, except as they were placed in the hands of the several companies heretofore mentioned, as collateral security to the notes.

On December 22, 1916, the Central Trust Company had filed its bill to foreclose the collateral trust agreement of April 29, 1913. The railway company had answered, asking an injunction against the holders of the collateral bonds, and also asking specifically for a continuance of the order of October 23, 1915. On April 30, 1917, the Mercantile Trust Company, standing in substantially the same position as the Mississippi Valley Trust Company, filed its petition of intervention in the consolidated foreclosure suits, and asked for the adjudication of its rights. The notes had matured which were held by the Mississippi Valley Trust Company and by the other companies, and to which the bonds were being held as collateral. The receivership had been extended to the foreclosure suits.

Such were some of the additional facts to be taken into consideration by the court in determining, March 1, 1918, the question whether the Mississippi Valley Trust Company should be restrained from selling the collateral bonds held by it. And the court also had to consider and determine the question of the status of the Mississippi Valley Trust Company as holder of the bonds in question. These questions were and are vital questions in the case. If the status of the trust company as holder of these bonds was such on March 1, 1918, in view of all the facts and circumstances then existing, that the court upon an application then made would have had jurisdiction, and been justified in issuing an injunctive order against the sale of said collateral, then the order of March 1, 1918, should be sustained; otherwise, not.

The validity of the transaction by which the trust company became the holder of the bonds in question as security for the note which it held of the railway company, and the status of the trust company as such holder, are to be determined by the local law, that is, of the state

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of Missouri, inasmuch as the transaction was a Missouri transaction. (The note and contract of pledge appear in margin.[1]) Hiscock v. Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945; Taney, Trustee, v. Bank, 232 U. S. 174, 180, 34 Sup. Ct. 288, 58 L. Ed. 558; Dale v. Pattison, 234 U. S. 399, 404, 34 Sup. Ct. 785, 58 L. Ed. 1370, 52 L. R. A. (N. S.) 754; Fourth St. Bank v. Trustee Millbourne Mills Co., 172 Fed. 177, 187, 96 C. C. A. 629, 30 L. R. A. (N. S.) 552; First Nat. Bank v. Lanz, 202 Fed. 117, 119, 120 C. C. A. 271; Dibert v. Wernicke, 214 Fed. 673, 131 C. C. A. 109.

[1] $125,000.00 St. Louis, Mo., May 1st, 1915.

May 1st, 1916, after date, we promise to pay to the order of Mississippi Valley Trust Company, one hundred twenty-five thousand dollars, for value received, at Mississippi Valley Trust Company, at St. Louis, Mo., with interest at the rate of six per cent. per annum from date, interest payable semiannually. Missouri, Kansas & Texas Railway Company,

C. N. Whitehead, Vice-President.

F. Johnson, General Treasurer.

Having executed our note as above, and being desirous of securing the same, as well as all other debts and liabilities for which we are now bound or may become bound to said Mississippi Valley Trust Company, of St. Louis, Mo., we do hereby pledge to said trust company, as collateral security for the payment of this note as well as for the payment of all other debts and liabilities for which we are now bound or may become bound to said trust company, the following described property, to wit:

Two hundred fifty thousand dollars ($250,000), face amount, consolidated mortgage five per cent. thirty-year gold bonds, series A, of Missouri, Kansas & Texas Railway Company in temporary form Nos. 407 to 516 inclusive, 659, 660, and 664 to 666, inclusive, for $10,000 each, of which we are in good faith the owners, the same being fully paid for and free from liens or claims of any kind whatever, and agree to give additional security whenever the market value of the above collateral should decline and on notification of said Mississippi Valley Trust Co., by any of its officers to us. In default of payment of said note at maturity, or the payment of any such other obligations, or in default of our giving such additional security, when so notified within twenty-four hours after such notice, we hereby authorize said Mississippi Valley Trust Co., or any one of its officers, or agents, to sell said collateral at public or private sale, or otherwise, at its option, without notice, and to apply the proceeds to the payment of said note, with all damages, interest, charges and costs and such other debts and liabilities; and in case the proceeds of such sale are not sufficient to cover the amount of said note as well as such other obligations, we agree to pay the balance thereof on demand, and in case there is any surplus left from such sale, such surplus shall be applied by said Mississippi Valley Trust Co., to the payment of any other debt or liability for which we are now bound or may become bound to said Mississippi Valley Trust Co.

Said Mississippi Valley Trust Co. shall also have the right, at any such sale, to bid for and purchase the said pledged property or any part thereof, in its own name, and for its own use and benefit.

Said Mississippi Valley Trust Co. is also authorized to use, transfer, or hypothecate said collateral, at its option, it being required on the payment of said note and all other debts and liabilities for which we are now bound or may become bound to said Mississippi Valley Trust Co., at any time before sale has been made of said collateral, to surrender same; and in case of any exchange of or additions to the collateral above specified, the powers and rights above granted shall extend to such additional or new collateral.

Notice sent to our place of abode or business shall constitute legal notice for additional security. Missouri, Kansas & Texas Railway Company,

C. N. Whitehead, Vice President.

F. N. Johnson, General Treasurer.

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It is necessary, therefore, to inquire whether the courts of Missouri have passed upon the questions involved. In case of Dibert v. D'Arcy, 248 Mo. 617, 154 S. W. 1116, where unissued corporate bonds, secured by mortgage on the corporate property, had been put up as collateral to the corporation's notes, under a contract very similar in terms to the contract in the case at bar, the court in its opinion said:

"Considering them (the collateral bonds) in the light of a mere additional promise of the maker of the notes to pay money, they cannot, from the very nature of the transaction, be considered as collateral security for the debt, for this would lead to the absurd result that one might make his promissory note for $1 with a collateral note for $2, so that, if he should be unable or fail to pay, the sale of the collateral would have simply the effect to double the amount of his indebtedness, without affording any additional security for the debt, other than a penalty for its nonpayment. Should he, however, secure the second note by mortgage upon property, a different proposition would be presented: Under such circumstances the note and mortgage may be treated as collateral to the indebtedness so far as is necessary to give the creditor in the first note the benefit, with respect to his indebtedness, of the lien upon the mortgaged property, nominally created as security for the collateral note. * * *"

Again:

"* * * As between the pledgor and pledgee, and those having notice of the character of the transaction, its only effect is to give the pledgee the benefit of the lien of the mortgage for the collection of his own debt. The amount of the mortgage obligations that he may have as collateral is only important in determining the extent to which his own debt may participate in the proceeds of the mortgage securities."

And again:

"* * * In so far as these bonds constitute a personal liability of the Hardwood Export Company they have no force whatever, otherwise than as an evidence of the pledge of an interest in the lands mortgaged to secure them. The pledgee becomes the holder of them for the purpose of enforcing his lien by the foreclosure of the mortgage. This lien constitutes the pledge and is collateral to the principal debt in the same sense as if it were a horse or the note of a third party or any other article of personal property."

It was further held that the holder of the collateral bonds held them as a trustee, and was subject to all the duties and liabilities of a trustee in acting with reference to said collateral bonds. This holding of the Missouri court is controlling here, and, though it is opposed to the views of a number of other courts, yet it is not without support of high authority. In re Waddell Entz Co., 67 Conn. 324, 327, 35 Atl. 257; Jno. Matthews v. Knickerbocker Trust Co., 192 Fed. 557, 113 C. C. A. 29; Third Nat. Bank v. Railroad, 122 Mass. 240.

The case of Wade v. Railroad, 149 U. S. 327, 13 Sup. Ct. 892, 37 L. Ed. 755, is not opposed. What that case held was that—

"Negotiable securities once put in circulation for value may be transferred for less than their face, but the maker and those claiming under him cannot limit the right of a subsequent holder to a recovery of what he may have paid therefor."

In the case at bar the bonds had not been "put in circulation for value."

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It is true, as claimed by counsel for appellant, that the collateral bonds in question cannot properly be considered either as assets of the railway company or as property of the railway company, within the meaning of those terms as used in the order appointing the receiver; and, from this, counsel draw the conclusion that when the trust company takes steps to realize upon the collateral bonds it is not interfering with any assets or property of the railway company. The argument is not entirely sound. The bonds have a twofold character and purpose: When properly sold by the railway company they become evidence of a debt owed by the railway company to the amount indicated by the face of the bonds; second, they are evidence that the holder of the bonds has a right to share in the proceeds of the security covered by the mortgage accompanying the bonds. The trust company, in taking these bonds as collateral, did not acquire any right in them whatever as evidence of a debt owed by the railway company. They evidenced no debt, for they had not been sold. But it did acquire an interest in the bonds as evidence of a right on the part of the holder to participate in the mortgage security. The debt owed by the railway company to the trust company was evidenced by the note in the hands of the trust company, and by that alone. The property covered by the consolidated mortgage was made the security for that note by the pledging of the bonds, and the extent to which the trust company might participate in the proceeds of that mortgaged property was determined by the amount of the bonds so held as collateral, limited, however, by the amount of the note itself. Any attempt on the part of the trust company to sell the bonds as evidencing a debt of the railway company might very possibly result in increasing the outstanding indebtedness of the railway company. This would diminish pro rata the value of each existing creditor's right to participate in the assets of the railway company, and would be in substance and effect an interference with those assets. Those assets were the res in the hands of the court. There was no necessity for the trust company to take steps to foreclose the mortgage secured by the bonds, because such foreclosure suit was already pending; and if the bonds were also collateral to the two-year secured gold notes, the same is true, because a suit to foreclose the collateral trust agreement was also pending.

This is not a case of attempting to force the holder of a lien to come into court by summary proceeding and have the validity of such lien determined. Such were the cases of Andrews v. Paschen, 67 Wis. 413, 30 N. W. 712; American, etc., Bank v. Ruppe, 237 Fed. 581, 150 C. C. A. 463; In re Rathman, 183 Fed. 913, 106 C. C. A. 253, and the cases therein exhaustively reviewed. Nor is it a case of interfering by summary proceeding with the possession of specific personal property held by a pledgee or other party claiming adverse rights. Such were the cases of Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; Marshall v. Knox, 83 U. S. (16 Wall.) 551, 21 L. Ed. 481; Wheaton v. Teleg. Co., 124 Fed. 61, 59 C. C. A. 427; Horn v. Railway (C. C.) 151 Fed. 626; Bd. of Educa-

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tion v. Leary, 236 Fed. 521, 149 C. C. A. 573. But it is a case that comes within well-established principles.

Property in the hands of a receiver appointed by a court may not be interfered with, even to carry out private agreements, contracts or trusts. Wiswall v. Sampson, 14 How. 52, 66, 14 L. Ed. 322; In re Tyler, 149 U. S. 164, 181, 13 Sup. Ct. 785, 37 L. Ed. 689; Hitz v. Jenks, 185 U. S. 155, 22 Sup. Ct. 598, 46 L. Ed. 851; High on Receivers (4th Ed.) §§ 136, 138, 140. Furthermore a court which is administering property already in its hands through a receivership may properly draw to itself all disputes as to liens and other rights upon or pertaining to such property. Morgan's Co. v. Railway, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 626; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; Farmers' Loan & Trust Co. v. Railway, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Wabash Ry. Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379; Central Trust Co. v. Railway (C. C.) 57 Fed. 3; Toledo, etc., Ry. Co. v. Trust Co., 95 Fed. 497, 36 C. C. A. 155.

This is a case where the court, through its receiver, having taken possession and control of the properties of the railway company, saw the trust company in possession of certain bonds of the railway company, by the sale of which the res in the hands of the court might be interfered with. The court further saw that those bonds did not evidence any debt owed by the railway company, but that the trust company had a valid interest in the bonds only as evidence of its right to participate in the mortgage security to the extent of a certain note held by it; under these circumstances in order to prevent sale of the bonds which might wrongfully increase the claims against the property in the hands of the receiver, to the detriment of other creditors, the court in its discretion concluded that the trust company should be enjoined from making such sale, without, however, denying or interfering with the right of the trust company to participate in the security under the mortgage.

The court was justified in its conclusion, and the order appealed from is affirmed.

(258 Fed. 355)

COHN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 22, 1919.)

No. 169.

1. INDICTMENT AND INFORMATION ⟸139—MOTION TO QUASH—TIME FOR MAKING.

A motion to quash an indictment on the ground that it does not charge facts sufficient to constitute an offense may be made at any time, even after verdict.

2. RECEIVING STOLEN GOODS ⟸7(2)—SUFFICIENCY OF INDICTMENT—INTENT.

An indictment under Cr. Code, § 48 (Comp. St. § 10215), for receiving property stolen from the United States, which does not charge that the accused received or retained the property "with intent to convert to his own use or gain," is fatally defective.

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8. Criminal Law ⟸400(3), 430—Secondary Evidence—Copies of "Official Documents."

Documents used as evidence in a naval court-martial, and required by statute to be transmitted to the Navy Department and there kept on file for two years, are "official documents" while so kept, and under Comp. St. § 1494, authenticated copies of such documents are admissible in evidence equally with the originals, and unauthenticated copies are inadmissible as secondary evidence.

In Error to the District Court of the United States for the Eastern District of New York.

Criminal prosecution by the United States against Samuel A. Cohn. Judgment of conviction, and defendant brings error. Reversed.

Robert H. Elder, of New York City (Charles E. Russell, of Brooklyn, N. Y., and H. Goldstein, of New York City, of counsel), for plaintiff in error.

James D. Bell, U. S. Atty., of Brooklyn, N. Y. (Vine H. Smith, Sp. Asst. U. S. Atty., of New York City, of counsel).

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The defendant below has been tried and convicted under an indictment the substance of which is stated in the margin.[1]

The court refused to set aside the verdict and sentenced the defendant to imprisonment in the federal prison at Atlanta for a year and three months.

The evidence discloses that the father of the defendant, at the time of the commission of the offense charged, conducted a tailoring shop in Brooklyn, and that the defendant was in charge of it for the father.

It appears that the custom among tailors was, when cloth of the type in question came into their possession to be made up into uniforms, before cutting into it, to send same to spongers to be sponged. In the process of sponging, if the spongers found any defect or flaw in the cloth, they indicated it by drawing a small white piece of cloth through the selvage of the material opposite the place where the defect existed and notified the manufacturer of the cloth of the defect, giving to the manufacturer, at the same time, the name of the supposed purchaser thereof from the manufacturer. Certain cloth, but whether it was part of that which was the subject of controversy on this trial or not was not developed, was sent from the shop of the accused's father

[1] The indictment charges that the defendant "did unlawfully receive certain property and valuable things, to wit, about 180 yards of cloth intended to be used in the making of United States Navy uniforms, of the goods and property of the United States, which said 180 yards of cloth had theretofore been embezzled, stolen, and purloined by another to the grand jurors unknown, and who cannot theretofore be more definitely stated herein, he, the said Samuel A. Cohn, then and there knowing at the time he so received the said 180 yards of said cloth that the same had been so embezzled, stolen, and purloined, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States in such case made and provided."

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to the spongers to be sponged. They found some defects in the cloth and notified the manufacturer and reported the name of Herman Cohn as that of the original purchaser of the cloth. The manufacturers replied that they had sold no such cloth to Cohn. They had sold cloth to the Navy Department and they took the matter up with the department. This led to investigation, and the laying of charges to the effect that one A. W. Meade, who was Chief Yeoman on the United States Steamship Arkansas, had stolen various quantities of navy blue cloth from the department and caused same to be delivered at the shop of Herman Cohn, and which defendant was accused of having bought. Officers made a visit to the tailoring shop and there some cloth, which was put in evidence, was found. Conversations were had with the defendant, some letters were taken out of the business files, and later were used as evidence. The result of the investigation which ensued was the indictment and conviction of the defendant.

The first question to be considered by this court is as to the sufficiency of the indictment. The indictment is based on section 48 of the Criminal Code, which may be found in the margin.[2]

The objection alleged against the indictment is that it does not charge in the words of the Criminal Code that the defendant received the property "with intent to convert to his own use or gain." This objection was not raised until after the jury was impaneled and sworn. It appears that after the jury was sworn counsel for defense moved that the United States Attorney be required to declare of record under what section of the Criminal Code the indictment was found and upon which he purposed to prosecute the defendant. The reply was:

"There are two sections, 35 and 48, and we have proceeded and will now proceed under 48."

Thereupon the defendant's counsel moved to quash the indictment on the ground that it did not state facts sufficient to constitute a cause of action under section 48 of the federal Penal Code. The court took the objection under consideration and announced on the next morning that he had examined the authorities with some care and denied the motion. An exception was duly taken and the matter has been assigned as error.

[1] A motion to quash ordinarily must be made before arraignment or plea; but, if an indictment does not charge facts sufficient to constitute a crime, the objection may be raised even on a motion in arrest of judgment, the defect not being cured by verdict. The defect alleged in this case is one of substance. The suggestion that the omis-

[2] "Sec. 48. *Receiving, etc., Stolen Public Property.*—Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined, by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender." Act March 3, 1875, c. 144, § 2, 18 Stat. 479; Act March 4, 1909, c. 321, § 48, 35 Stat. 1098 (Comp. St. § 10215).

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sion relates to a matter of form and so came too late is clearly untenable.

[2] The trial judge apparently thought that, because there was no comma in the statute between the phrase "in his possession" and the phrase "with intent to convert," the intent clause was intended to modify the verbs "have" and "retain" only. That construction of the statute does not conform to the construction which appears to have been placed upon it by the Supreme Court in Kirby v. United States, 174 U. S. 47, 53, 19 Sup. Ct. 574, 43 L. Ed. 890. In that case it was held incumbent upon the government to prove beyond a reasonable doubt: (1) That the property was in fact stolen from the United States; (2) that the defendant received or retained in his possession with intent to convert to his own use or gain; (3) that he received or retained it with knowledge that it had been stolen from the United States. And Mr. Justice Harlan, who wrote the opinion of the court, said that—

"The act of Congress upon which the present indictment rests makes the receiving of stolen property of the United States with the intent by the receiver to convert it to his own use or gain, he knowing it to have been stolen, a distinct, substantive felony."

The indictment now under consideration charges: (1) That the property was stolen; (2) and that it was the property of the United States; (3) that the defendant unlawfully received it; (4) that defendant knew at the time he received it that it had been stolen. But the allegation that defendant received or retained the property with the intent to convert to his own use or gain is not to be found. And we are obliged to hold upon the authority of Kirby v. United States, supra, that the failure to allege that defendant received it "with intent to convert to his own use" is a fatal defect.

[3] While there must be a reversal on the ground mentioned and we might conclude our decision at this point, we deem it important to state our opinion as to the inadmissibility of certain evidence admitted over objection and exception in order that a repetition of the error may be avoided on the second trial if one takes place. It appears that one of the pay inspectors of the United States Navy visited the shop prior to defendant's arrest and asked to see his correspondence. This the defendant consented to, and the correspondence was produced. Carbon copies of letters addressed to Meade, the Chief Yeoman of the Arkansas, were found which the defendant stated he had written. The inspector had defendant write on these carbon copies that they were true copies of the originals. There were also found original letters written by Meade. These with carbon copies of the replies the inspector took away with him. He had two typewritten copies made of them, and of some of them photographic copies were made. The originals were not produced at the trial, neither were the original carbon copies. The inspector was asked what became of the file of correspondence which he had taken from the shop, and he replied that the last time he saw them they were in evidence in the court-martial case (of Meade) in the Brooklyn Navy Yard. He was asked what the naval routine would be with respect to documents used in a court-

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martial, and he replied that they would be filed with the record of the court-martial in the office of the Judge Advocate General of the Navy in Washington, as a part of the records of the United States government. The inspector having identified the carbon copies, the typewritten copies and the photographic copies which he had made, the government offered them in evidence. The defense objected on the ground that they were not originals, were incompetent, and not the best evidence. Counsel for the government in reply offered to take the stand and testify that the papers came from the Judge Advocate in Washington, but counsel for the defense said he would not put him to that trouble and that the quality of the evidence would not be altered by their coming from the Judge Advocate's office. The admission that the originals were in that office showed, he said, that—

"They are not lost, strayed, or stolen, and it must be either one to make this secondary evidence in the case."

No evidence had been introduced to show that the files had been withdrawn from the Judge Advocate's office, or that it was impossible or even difficult to produce the originals, or that a request had been made upon any one to produce them. And there was no evidence that the typewritten and photographic copies were accurate reproductions of the originals. That photographic copies may be received in evidence under some circumstances is no doubt the law.

In Wigmore on Evidence, vol. 1, § 797, that writer considers the question whether photographic copies may be used at all for the purpose of identifying handwriting, and states that a photograph of a writing may be made to falsify like other photographs and like other kinds of testimony, so that especial care should be taken to secure positive testimony as to the accuracy of reproduction, and he also states that it is generally conceded that a photographic copy of handwriting may be used instead of the original; that if the original is obtainable a photograph is inadmissible; and if the original is not obtainable a copy may be used. In the present case, the photographic copies were admissible in evidence only after it had been shown that they were accurate reproductions of the originals, and the absence of the originals had been satisfactorily accounted for.

The best evidence rule, of course, does not mean that secondary evidence cannot be received if the original is in existence. The rule simply requires that the best evidence that the nature of the case is susceptible of must be produced. The rule has its origin in a suspicion of fraud. If there is better evidence of the fact which is withheld, the presumption is that the party has some sinister motive for not producing it. But as the Supreme Court declared in United States v. Reyburn, 6 Pet. 352, 366 (8 L. Ed. 424):

"Rules of evidence are adopted for practical purposes in the administration of justice, and must be so applied as to promote the ends for which they are designed."

In that case it was charged in the indictment that the defendant had "issued" a commission for a certain vessel that it might commit hostilities against Brazil with which country the United States was at

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peace. A witness was asked whether he had seen the commission. It was objected that no evidence as to the character or contents of the commission could be received because the United States had not produced the commission and had not obtained a copy of it from the archives at Buenos Ayres, nor shown that the government had made any effort to obtain a copy. The court held that, when the nonproduction of the written instrument is satisfactorily accounted for, secondary evidence of its existence and contents may be shown; the rule being applicable to criminal as well as civil suits. And the court went on to say that—

"If it should be admitted that a record is there [at Buenos Ayres] to be found of this instrument, and that on application a copy of it might have been procured, it would be carrying the rule to pretty extravagant lengths to require the application to be made."

In the pending case this court takes judicial notice of the acts of Congress and of the fact that articles for the government of the Navy require the proceedings of summary courts-martial to be transmitted to the Navy Department "where they shall be kept on file for a period of two years from date of trial, after which time they may be destroyed in the discretion of the Secretary of the Navy." U. S. Comp. St. 1916, Ann. vol. 4, § 3002. The provision requiring the record to be kept on file for a period of two years, etc., was added to the law by an amendment by Act February 16, 1909, c. 131, § 14, 35 Stat. 622. In the view we take of this case, we do not find it necessary to decide whether a trial court has the right to compel by a subpœna duces tecum the production in any part of the United States of any document or paper which an act of Congress says shall be kept on file in one of the departments at Washington. If the department is compelled to produce it in court in New York or San Francisco, it certainly is not kept on the files of the department during the time required for its production and return. But however that may be, there can be no doubt that if the departments at Washington can be compelled to produce in any part of the country the originals of any documents or papers they may have on file, the greatest embarrassment and confusion to the department would be the consequence of such a decision. And at the same time a great and unnecessary financial burden might be imposed upon the litigants. We may say in this case, as was said in the Reyburn Case, supra, that to say that the court, even if it possessed the power to compel the production of the originals, should be required to exercise it under the best evidence rule, would be to carry the rule to pretty extravagant lengths.

In Leathers v. Salvor Wrecking Co., 15 Fed. Cas. 116, No. 8,164 (1875), Mr. Justice Bradley, of the Supreme Court, sitting in the Circuit Court for the Second District of Mississippi held that photographic copies of public documents on file in the War Department at Washington were properly received in evidence; their genuineness having been authenticated in the usual way. The case was in admiralty, a libel having been filed to recover damages for wrecking a steamboat which the defense claimed had been sunk while in the service of the Confederate States and which on the surrender of the Confederate forces was said

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to have become the property of the United States. Mr. Justice Bradley, citing no cases, said:

"It is objected by the counsel for the libelant that the documentary evidence in question is not properly authenticated. We think it is sufficiently authenticated to make it competent. The original papers are on file in the War Department, and cannot, without public detriment and inconvenience, be removed. Photographic copies are the best evidence that the case admits of. The wonderful art by which they are reproduced gives us, as we may say, duplicate originals; and in the case of public records or documents properly deposited in the public archives of the country, and which the public interest requires should be there kept and preserved, no better evidence of their character and authenticity can be had than such a reproduction of them by the operation of natural agencies, and an authentication of their genuineness in the usual way, by proof of handwriting. We think the evidence entirely competent and entirely conclusive."

Congress has provided that—

"Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof." U. S. Compiled Statutes 1916, Ann., vol. 3, § 1494.

Congress began to legislate on this subject at the very beginning of the government, the first act being passed in 1789, when it was provided that all copies of records and papers in the office of the Department of State should be evidence equally as the original record or paper. Act Sept. 15, 1789, c. 14, § 5, 1 Stat. 69 (Comp. St. § 1494). In 1797 a similar statute was passed in respect to records and papers in the Treasury Department. Act March 3, 1797, c. 20, 1 Stat. 512. And from time to time similar statutes were passed respecting records and papers in all the different departments. In Block v. United States, 7 Ct. Cl. 406, 413, the statutory provision above referred to was considered, and the court declared that—

"The words 'documents and papers,' used in the several acts of Congress, cannot be held to mean every document or paper on file in the Department, but such only as were made by an officer or agent of the government in the course of the discharge of his official duty. Any other rule of interpretation would defeat the reason on which all public writings are admissible as evidence, i. e., that they have been made by authorized and accredited agents, appointed for the purpose, and that the subject-matter of such writings is of a public nature.

"Official documents, duly certified, need no further proof; but other documents, so certified, do not, by the mere fact of certification, become so authenticated as to entitle them to be received as evidence if they are objected to; but the originals must be produced and proved according to the course of the common law."

But if the "originals" above referred to happen themselves to be on file in one of the departments, there must be power in the courts to compel their production when needed in a judicial proceeding, or else transcripts or copies of them certified under the seal of the department must be admissible in evidence. And if the statute applies only to such writings as "were made by an officer or agent of the government in the course of the discharge of his official duty," then, of course, it has no application to letters by this defendant to the Chief Yeoman of the battleship Arkansas, although it would extend to any letters

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written by the latter to the defendant or to the defendant's father. We are not inclined to put so narrow a construction upon the statute, and we can see no substantial reason for thinking that copies of such letters as are on file in the record of the proceedings of the court-martial, and which are authenticated by the Department of the Navy as provided in the act, may not be introduced in evidence at the trial of the defendant. The statute authorizes the introduction in evidence of copies of any documents or papers which are required by law to be kept on file in the departments, provided such copies are authenticated under the seal of the department in which the document is kept. It is the opinion of the majority of this court that the statute was intended to apply at least to any document or paper which is by law required to be filed and kept on file in any of the Executive Departments of the government. A document or paper which is required to be so filed and kept on file is in the opinion of the majority of the court an official document as much so as one which is written or published by an officer in his official character or in the performance of an official duty. The word "official" is defined in the New Standard Dictionary as follows:

"1. Of or pertaining to an office or public trust; as official duties.
"2. Derived from the proper office or officer, or from the proper authority; authoritative; as, an official report."

A paper which must be kept on file in a designated office and which cannot be removed therefrom, pertains to that office, and so becomes official. And we are unable to see why the statute is not as applicable to that class of official papers as well as to the other class. The one class is as much within the letter of the statute as is the other, and it is also as much within the reason and the spirit of the statute.

The introduction in evidence of copies of letters on file in the Department of the Navy at Washington, and which are required by law to be kept there, and which were not authenticated under the seal of the department, was error. Copies so authenticated would have been as admissible as the originals; copies not so authenticated were not as admissible as the originals.

In what has been said we are not to be understood as intending to lay down the proposition that copies of official papers on file in an Executive Department can be received in evidence only when they are authenticated under the seal of the department. It is not our understanding that the provision of the statute under consideration was intended to be exclusive. But if copies not authenticated as provided in the statute are to be introduced in evidence, it is certainly necessary that a proper foundation for their admission should be laid, having in mind the general rule that no evidence shall be received which presupposes that the party who offers it can obtain better evidence.

Judgment reversed.

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(258 Fed. 363)

AGENCY OF CANADIAN CAR & FOUNDRY CO., Limited, et al. v. AMERICAN CAN CO.

(Circuit Court of Appeals. Second Circuit. April 21, 1919.)

No. 148.

1. AMBASSADORS AND CONSULS ⟸5½, New, vol. 8A Key-No. Series—AUTHORITY OF GOVERNMENT REPRESENTATIVES—CHANGE OF GOVERNMENT.
The Russian Supply Committee in America, created in 1915 to have charge of the purchase of supplies and munitions for the Russian government, certified in 1917 by the recognized Russian ambassador to have power to act in that behalf, *held* to have authority to make a settlement of contracts relating to purchase of munitions.

2. CONSTITUTIONAL LAW ⟸68(1)—RECOGNITION OF FOREIGN GOVERNMENT.
Who is the sovereign de jure or de facto of a country is a question for the political department of the government, and the decision by that department in this country is conclusive upon the courts.

3. INTERNATIONAL LAW ⟸9—EFFECT OF CHANGE OF GOVERNMENT.
The rights and liabilities of a state are not affected by a change in the form or the personnel of its government, however accomplished.

4. INTEREST ⟸37(1)—RATE—CONTRACT FIXING RATE "TO DATE OF PAYMENT."
An agreement to pay interest at a specified rate "to the date of payment of the amount" means to the date of actual payment, and not to the date when payment should have been made, and the contract rate governs to the date of entry of judgment or decree in equity for the amount.

5. INTEREST ⟸46(1)—RIGHT TO INTEREST—MONEY WRONGFULLY WITHHELD.
Where different claimants to an admitted indebtedness of defendant made a valid settlement of their differences, fixing the part due each, which settlement defendant refused to recognize, in the absence of any agreement respecting interest, defendant *held* chargeable with interest at the legal rate from the date of demand after the settlement.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Agency of Canadian Car & Foundry Company Limited, and the Recording & Computing Machines Company, against the American Can Company. Decree for complainants, and defendant appeals. Modified.

For opinion below, see 253 Fed. 152.

This cause comes here on appeal from a decree entered in the United States District Court for the Southern District of New York, on August 14, 1918. The Agency of Canadian Car & Foundry Company, Limited, hereinafter called the "Agency Company," is a corporation organized under the laws of the state of New York, and is a citizen of that state, having its principal place of business in the city of New York. The Recording & Computing Machine Company, hereinafter called the "Recording Company," is a corporation organized under the laws of the state of Ohio, and is a citizen of that state, having its principal place of business in the city of Dayton, in that state. The American Can Company is a corporation organized under the laws of the state of New Jersey, and is a citizen of that state, having its principal place of business in the city of New York. The Canadian Car & Foundry Company, Limited, hereinafter referred to as the "Canadian Company" is a corporation under the laws of the Dominion of Canada.

On respectively, February 27, 1915, and March 8, 1915, two contracts were entered into at Petrograd, Russia, between the Chief Artillery Board of the

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Russian government and the Canadian Company. The first contract was for 2,500,000 high explosive shells and 500,000 shrapnel shells. The second contract was for 2,000,000 shrapnel shells. The 2,500,000 shrapnel shells so contracted for required 2,500,000 time fuses. This caused the Canadian Company in March, 1915, to enter into a contract with the Recording Company, in which the latter company agreed to manufacture for the former company 2,500,000 time fuses. In pursuance of these contracts the Russian government, through its attorney, advanced to the Canadian Company between April 20, 1915, and November 8, 1915, $9,904,997.

In October, 1915, there was organized the Russian Supply Committee in America, which took charge on behalf of the Russian government of all matters arising out of the contracts; and between November 22, 1915, and January 5, 1917, the attorney for this Committee, acting under its instructions, turned over to the Canadian Company, on account of the purchase price stipulated in the contracts, various amounts aggregating $64,000,000, which with the advances made prior to November 22, 1915, aggregated $74,000,000. On March 8, 1916, the contract of February 27, 1915, and the contract of March 8, 1915, were amended, and as amended were assigned with the consent of the Russian government to the Agency Company. After March 8, 1916, the performance of the contracts was carried on exclusively by the Agency Company.

Under date of August 23, 1916, an agreement was made between the Recording Company and the defendant for the manufacture by the Recording Company of 1,250,000 "22-second Russian combination fuses." Under date of October 31, 1916, an agreement was made between the Agency Company, the Recording Company, and the defendant, whereby the Agency Company waived any claim or lien which it had upon the time fuses manufactured by the Recording Company for the defendant under the contract of August 23, 1916, In the contract of October 31, 1916, the defendant agreed to pay to the Agency Company $1 of the purchase price of each fuse delivered "until all sums which may now or hereafter be due from and payable" by the Recording Company to the Agency Company should be adjusted or otherwise satisfied. This agreement is one of especial importance in this case. The Agency Company claimed that as a result of the dealings between the Recording Company and itself the latter was indebted to it in a large amount, and under date of November 17, 1916, what is known as the "Arbitration Agreement" was entered into between these two companies. They therein agreed to adjust and settle all accounts and claims arising under the agreement between them.

On January 2, 1917, the Agency Company assigned, among other things, to the Chief Artillery Board of the Imperial Russian government, which was referred to in the assignment as "the government," "all debts, accounts, and sums of money now due and owing, or accruing due from the manufacturer to the Agency Company up to, but not in excess of," $2,352,315.63. The agreement also assigned to the (Russian) government the agreement of October 31, 1916, "with full right and authority on the part of the government to receive from the American Can Company all sums of money payable to the Agency Company under the terms of said agreement." And the agreement expressly provided that the government would pay to the Agency Company "the aggregate amount of the sum or sums that may now be due or hereafter ascertained to be due or accruing due from the manufacturer to the Agency Company, under the terms of said agreements first above referred to, and to make such payments to the Agency Company as and when such sums respectively are ascertained, or are admitted by the manufacturer to be due or accruing due: Provided, however, that the government shall not be liable to pay any sum or sums due or accruing due from said the Recording & Computing Machines Company in excess of the aggregate amount of two million three hundred and fifty-two thousand three hundred and fifteen dollars and sixty-three cents ($2,352,315.63), and that for any sum or sums due or hereafter accruing due from the manufacturer to the Agency Company, in excess of the amount paid by the government in respect thereof, the Agency Company shall retain its rights to receive payment for the same from the manufacturer and the said Ohmer: And provided, also, that the rights of the

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Agency Company to issue execution on any judgment recovered by it against the manufacturer and/or the said Ohmer in respect of the same shall not be exercised by the Agency Company until after the government has been reimbursed by the manufacturer and the said Ohmer for any and all sums paid and or credited to the Agency Company hereunder, nor until all contracts which the manufacturer now has or may hereafter have for the manufacture of Russian time fuses have been completed by the Recording & Computing Machines Company."

On January 11, 1917, the Recording Company agreed with the Russian government that each firm or corporation having a contract with it for time fuses (including thereby the defendant) should deduct $1 from the purchase price of each fuse and pay the same to the government until payment should be made in full of the amount which the government was required to pay to the Agency Company under the agreement referred to in the preceding paragraph. On September 14, 1917, the defendant by letter acknowledged that it held $1,500,000 (or $1 per fuse upon the fuses manufactured for it) for account of the Agency Company or the Imperial Russian government as their interests might appear, and it agreed to retain the same "until such time as there shall have been made a final settlement and adjustment of accounts" between the parties interested, to wit, the Recording Company, the Agency Company, the Imperial Russian government, and the defendant, "or until their interests shall be finally determined by law." The agreement of September 14, 1917, also contained an important agreement as to the payment of interest, to which more specific reference is made in the court's opinion.

On December 18, 1917, an agreement was made between the Agency Company, the Recording Company, and the Russian government acting through Gen. Khrabroff, the president of the Russian Supply Committee in America, which it is claimed was a complete and final settlement, adjusting and determining all matters of account including the amount due from the Recording Company to the Agency Company; and on that day the Recording and Agency Companies by a separate instrument stated and adjusted their accounts, and the Recording Company conveyed to the Agency Company an interest, constituting a prior claim, to the extent of $713,176.07 in the fund of $1,500,000 held by the defendant; and on the same day last above named the Russian government assigned to the Agency Company and to the Recording Company all its right, title, and interest either in law or in equity in and to the sum of $1,500,000, and such interest as may be payable thereon, held by defendant, in such proportion that the Agency Company "shall have and enjoy the sum of $713,176.07 out of said moneys and the Recording Company shall have and enjoy the balance of $786,823.93 of said moneys and such interest as may be payable upon said moneys to be divided equally between said companies."

This suit is brought to compel the defendant to pay to the plaintiffs the moneys which they claim are improperly withheld from them by the defendant. The defendant admits that it is indebted in the amount of $1,500,000, and declares that it has been ready and willing to pay the same as soon as payment thereof would relieve it from possible liability to pay the same again in whole or in part to some other claimant or claimants. The defendant denies that the governments referred to in the various averments of said bill of complaint as "the Russian government" were the same governments; and it declares that it is without knowledge whether any rights or property alleged in said bill of complaint to have been acquired or vested in any Russian government have been acquired or vested in any other or subsequent Russian government in said bill of complaint mentioned, or in the complainants, or either of them, or whether any person, natural or corporate, or persons or body of persons, referred to in said bill of complaint or in any exhibit thereto as acting or purporting to act on behalf of any Imperial Russian government or any other Russian government had authority or power to so act. The court below has entered a decree in favor of complainants.

Simpson, Thatcher & Bartlett, of New York City (Graham Summer, of New York City, of counsel), for appellant.

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T. Ludlow Chrystie, of New York City (Arnold Wainwright, K. C., of Montreal, Can., and Francis K. Raynor, of New York City, of counsel), for appellee Agency of Canadian Car & Foundry Co., Limited.

Walter C. Noyes, of New York City (H. A. Toulmin and H. A. Toulmin, Jr., both of Dayton, Ohio, of counsel), for appellee Recording & Computing Machine Co.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the above facts). This is a suit in equity brought for the recovery of $1,500,000 with interest. The general rule of course is that, where the cause of action is for the payment of a sum of money merely, there is no reason why a court of equity should be resorted to. Raton Waterworks Co. v. Raton, 174 U. S. 360, 19 Sup. Ct. 719, 43 L. Ed. 1005. An action at law is regarded as the appropriate remedy in such cases; the remedy at law being full, adequate, and complete. The Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163) in section 267 (Comp. St. § 1244) expressly declares that suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. The bill of complaint in this case, however, alleges that the plaintiffs have no adequate remedy at law and that the fund which they seek to recover is held by the defendant in trust. Whether there is or ever has been a specific trust res, or anything more than an ordinary indebtedness, payment of which the plaintiffs might have obtained in an action at law, and whether such an action would have been fully adequate, has not been raised by motion or answer, or on the argument. We observe, however, that counsel for defendant states in his brief as a fact that "there is no fund in a proper sense; there is merely an indebtedness of $1,500,000 owing by the defendant." Although an appellate court may, and not infrequently does, sua sponte, take the objection and dismiss the bill (Southern Pacific R. R. Co. v. United States, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507), it will not in all cases pursue that course. We see no reason why in the present situation we should enter upon that inquiry, but we will assume that, if the plaintiffs are entitled to the money for which they have filed their bill, they may maintain their suit in a court of equity.

We may, however, add that the complainants derive through an assignment, and that the assignee of a chose in action under the decisions of the Supreme Court cannot proceed in equity merely on the ground that his interest is an equitable one, but must proceed at law. New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484; Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271. We are not unaware that, where a part only of a chose in action has been assigned, the assignee has been allowed to sue in equity, upon the theory that courts of law would not recognize the right to split up a single cause of action into many

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actions without the assent of his debtor, since it might subject him to many embarrassments not contemplated in the original contract. Mandeville v. Welch, 5 Wheat. 277, 5 L. Ed. 87. But even in case of partial assignments it is not necessary to sue in equity if the debtor consents to the assignment. 5 C. J. 1000. In this case the whole interest was assigned by the same instrument to two assignees, although in unequal shares, and these two assignees are the complainants, and the whole chose, and not a part of it, is the subject-matter involved. If there are equitable grounds why the assignees should not have proceeded at law, they do not suggest themselves. The defense has not interposed objections, and none were made by the District Judge, and under the circumstances we are not now inclined to dispose of the case otherwise than upon the merits.

[1] We start with the proposition that there is conceded to be $1,500,000 in the possession of the defendant which it is not entitled to withhold, provided the Russian government has through its proper officials effectively transferred and assigned all the right, title, and interest it may at any time have had therein to the plaintiffs in this suit, so that upon payment being made to the plaintiffs in the proportions to which they may be respectively entitled the defendant can be compelled to pay twice, because some Russian government at some time in the future may repudiate the action taken by those who signed the agreement of December 18, 1917, and deny their authority to act as the official representatives of Russia. We also find that this fund belongs to the complainants in the following proportions: $713,176.07 to the Agency Company; $786,823.93 to the Recording Company. What interest, if any, on these respective sums the complainants may be entitled to will be considered in a subsequent part of the opinion.

We come, then, to consider first whether the Russian government has surrendered effectively any interest it may have had in the $1,500,000 owing by the defendant; and it is to be observed in respect to this phase of the case that the agreement of December 18, 1917, by which the Russian government is said to have transferred to complainants all its interest in the fund was by Khrabroff as president of the Russian Supply Committee in America, "acting for and on behalf of the Russian government," which reads as follows:

"Whereas, by agreement dated the 8th day of March, 1916, made between the parties hereto and * * * as voting trustees, two hundred (200) shares of the capital stock of * * * the Agency Company, were assigned and pledged to the said voting trustees as security for the performance by the Agency Company of the two contracts mentioned in said agreement; and

"Whereas, all matters and questions arising out of or in connection with the performance of said contracts have now been adjusted and settled and it is desired to dissolve the voting trust created by said agreement and to reassign said shares:

"Now, therefore, this indenture witnesseth: The parties hereto hereby consent and agree to the cancellation of the said hereinabove recited agreement, dated the 8th day of March, 1916, and to the dissolution of the voting trust thereby created and the reassignment of the shares of the capital stock of the Agency Company mentioned in said agreement and the delivery of the certificates of said shares to the holders of the voting trust certificates issued under the provisions of said agreement."

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Whatever rights the Russian government may at any time have had in the fund of $1,500,000, they came to an end with the execution of the above document, provided General Khrabroff had authority to act on behalf of the Russian government. The claim that he had no authority to act for the government of Russia is not taken seriously by us. His authority is conclusively shown. General Khrabroff was president of the Russian Supply Committee. That committee as previously said was created in October, 1915. Associated with General Khrabroff on the committee were the commercial attaché, the naval attaché and the financial attaché to the Russian embassy at Washington, the official character of all of whom had been duly recognized by the government of the United States, as appears from a diplomatic list issued by the Department of State and also from the certificate of the Russian ambassador to the United States, Boris Bakhmetieff, all of which are in the record.

On July 5, 1917, the United States government recognized Boris Bakhmetieff as the Russian ambassador. The record contains a certificate, signed and sealed on May 8, 1918, by Robert Lansing, Secretary of State of the United States of America, stating that Boris Bakhmetieff presented his letter of credence to the President and was officially received by the President as ambassador extraordinary and plenipotentiary of Russia on July 5, 1917, and that he has since that date been recognized by the Department of State as the ambassador of Russia. The certificate of the ambassador declared the official character of the Russian Supply Commission, and that it was organized to purchase supplies in the United States for Russia, and to accept supplies purchased or manufactured in the United States for Russia, and that it had power to settle all matters relating to contracts for supplies so purchased or manufactured during the time herein involved.

[2] Who is the sovereign de jure or de facto of a country is a question for the political departments of the government. It is not a judicial question. The decision of the matter by the political departments is in this country conclusive upon the judges. Jones v. United States, 137 U. S. 202, 212, 11 Sup. Ct. 80, 34 L. Ed. 691.

The same principle is the established law of England. Republic of Peru v. Dreyfus, 38 Ch. Div. 348, 356, 359. In the same way the question who represents and acts for a foreign sovereign or nation in its relations with the United States is determined, not by the judicial department, but exclusively by the political branch of the government. In re Baiz, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. So that the certificate of the Secretary of State, above referred to, certifying to the official character of Boris Bakhmetieff as the Russian ambassador to the United States is not only evidence, but it is the best evidence, of Mr. Bakhmetieff's diplomatic character, and is to be regarded by the courts as conclusive of the question, and the court could not proceed upon argumentative and collateral proof. And the certificate of Mr. Bakhmetieff, given under his hand and seal as Russian ambassador, concerning the membership and powers of the Russian Supply Committee, must be regarded in like manner as an

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authoritative representation by the Russian government on that subject, and as such binding and conclusive in the courts of the United States against that government on the matters to which it relates.

In the Goods of Anne Dormoy, 3 Hagg. Ecc. 767 (1832), the court held that the certificate of the French consul general was sufficient proof of the law of France, the doubt being whether the French ambassador himself should not have certified, instead of the consul general. In the Goods of Klingman, 3 Swabey & Tristram, 18 (1862), the ambassador to Great Britain of the King of Hanover gave a certificate under the seal of the legation that a will executed in accordance with law of England was a valid will under the law of Hanover, and the court held that such a certificate was sufficient evidence of the foreign law. In the Goods of Prince Oldenburg L. R. 9 Prob. Div. 234 (1884), the question was as to the law of Russia concerning the validity of a will of a deceased member of the royal family. The court received in evidence a certificate under the hand and seal of the Russian ambassador in England to the effect that by the law of Russia no testamentary dispositions of any member of the royal family could have any effect unless approved by the Emperor. The certificate was accepted as sufficient proof of the law of Russia.

[3] The court has no doubt as to the validity of the settlement made in December, 1917. The principle of law is well established that the rights and liabilities of a state are not affected by a change in the form or the personnel of a government, no matter how that change may be effected. The obligations of a state, the debts due to and from it, are not affected by any transformation in the internal organization of its government. In Taylor's International Public Law, § 161, he says:

"As the people as a whole were bound at their creation by the acts of organized agents, each new government succeeds not only to the fiscal rights but to the fiscal obligations of its predecessor."

And in section 160 he says:

"It is the privilege of every state to adopt any form of government it deems best suited to its internal wants and conditions, and its identity is never lost so long as its corporate existence survives. While that is preserved neither internal revolutions, nor alienations of parts of its territory can diminish any of its rights or discharge it from any of its obligations."

The question at issue being, on this phase of the case, whether the Russian government has effectually divested itself of all interest in the moneys now in the hands of the defendant, this court holds that the certificate of the personal representative of that government, duly accredited to and recognized by the government of the United States, certifying that the official who assumed to assign and release any such interest as his government might have was authorized to act in behalf of his government in making such assignment and release, is competent and conclusive evidence, which the court below properly held to be decisive.

[4] This brings us to the question as to the rate of interest which the defendant should be required to pay to the complainants. In the agreement of September 14, 1917, the defendant agreed that, in the

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event of any portion of the $1,500,000 fund becoming payable to the Recording Company from the defendant, the latter—

"will allow a charge by you [the Recording Company] for interest at the rate of 2 per cent. per annum, or such other rate as the Can Company [defendant] may actually receive from its banking house on the deposit of the aforesaid sum upon such sum as may be paid to you from the aforesaid sum; said interest to be figured from November 1, 1917, to the date of payment of the amount. It is furthermore understood that no charge for interest prior to November 1, 1917, shall be allowed."

At the time that agreement was made there were, as we have seen, disputes pending between the Recording Company, the Agency Company, and the Russian government, and also between those parties and the defendant. As this fund was withheld pending the settlement of the disputes, it was agreed that interest was "to be figured from November 1, 1917, to the date of payment of the amount," and it was also expressly agreed, as above appears, that "no charge for interest prior to November 1, 1917, shall be allowed." The District Judge accordingly has held, rightfully, that the Recording Company was entitled to interest only from November 1, 1917.

Then the agreement was that interest was to be allowed at the rate of 2 per cent. per annum, or such other rate as the defendant received from its banking house on the deposit of the $1,500,000 fund; and the testimony in the record shows that defendant has not received from any banking house interest on any deposit at a higher rate than 2 per cent. per annum since November 1, 1917. The District Judge accordingly has held that the Recording Company is entitled to interest at the rate of 2 per cent. per annum from November 1, 1917, to December 28, 1917, and that from December 28, 1917, it is entitled to interest at the rate of 6 per cent. per annum. His theory evidently was that the Recording Company on December 28, 1917, was entitled to receive the $786,823.93, a final settlement having been arrived at, but as the defendant declined to pay when the time for payment arrived on December 28, 1917, and stated that it would not pay except "pursuant to the judgment of a court," it was from that time on in default, and therefore bound to pay interest at the legal rate of 6 per cent. per annum. We have no doubt that the defendant would be rightfully chargeable with that rate from the time of the default if the parties had not expressly agreed that the rate of interest should be 2 per cent. per annum "to the date of payment of the amount." If those words mean to the date when the money should have been paid, the District Judge was right in charging the defendant with interest at the rate of 6 per cent. per annum from December 28th. If the words, however, mean to the date when payment is made, he committed an error. If the parties meant the words to have the former meaning, they certainly did not say so; and the court is not at liberty to say so for them. In Ex parte Fewings, 25 Chan. Div. 338, Fry, L. J., said, " 'Paid' refers to an actual receipt of money." And we say that in the same way "to the date of payment of the amount" means to the date of the actual receipt of the money.

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The question of interest was little discussed at the argument. We derived from it no assistance as to the rights of parties to interest who are situated as are the parties to this litigation. The court below cited no authorities upon the question of interest, and neither of the counsel for the complainants have cited any in their briefs. This court approached this subject of the right of interest in sympathy with the holding of the lower court, thinking, though perhaps without justification, that the conduct of the respondent in withholding payment was influenced by the low rate of interest upon which the parties had agreed. On this branch of the case the court entertained much the same feeling as that which Lord Chancellor Herschell expressed in London, C. & D. Ry. Co. v. Southeastern Ry. Co., [1893] App. Cas. 429, 437, when he said:

"I confess that I have considered this part of the case with every inclination to come to a conclusion in favor of the appellants * * * of giving them interest * * * for this reason: that I think that when money is owing from one party to another, and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party, who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld, from the time of action brought, at all events. But I have come to the conclusion, upon consideration of the authorities, agreeing with the court below, that it is not possible to do so, although, no doubt, in early times the view was expressed that interest might be given under such circumstances by way of damages."

The English and the American law on the subject of interest differ, or did differ, at the time Lord Herschell wrote. The courts of this country generally allow interest at the legal rate by way of damages from the time of the maturity of an obligation, where the parties have not made an express agreement for interest after maturity. We have not in this case that difficulty to encounter. The difficulty here is that we do not see our way to sustaining the decree of the District Judge in allowing interest at the rate of 6 per cent. from December 28, 1917, on the sum due the Recording Company. That interest we might have allowed, were it not for the express agreement of the parties that the fund should bear interest at the rate of 2 per cent. until payment.

Prior to St. 37 Hen. VIII, c. 9, the taking of interest for the use of money was unlawful in England. That statute authorized the taking of interest, and fixed the lawful rate at 10 per cent. per annum, and punished any one who received more with forfeiture and imprisonment. The history of the right to interest in England is a matter of curious interest until 1854, when St. 17 & 18 Vict. c. 90, abolished all usury laws and established "free trade in money," largely through the influence of Jeremy Bentham. In this country the courts from the beginning viewed the allowance of interest with greater favor than the courts of England. There was never any doubt with our courts about the right to interest when expressly contracted for, or where an undertaking to pay it might be implied from the usages of trade;

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and from a very early date the American courts recognized the fact that the English common law was not suited to the conditions existing in this country and they declined to follow it. In Selleck v. French, 1 Conn. 32, 6 Am. Dec. 185, Chief Judge Swift, speaking for the Connecticut Supreme Court of Errors, specified nine classes of cases in which interest was allowed in that state, and concluded by saying: "Such are the principles which have been long established in this state." And the fifth of the propositions it is interesting to note was the following:

"5. Where one has received money for the use of another, and it was his duty to pay it over, interest is recoverable for the time of the delay; but if the holder of money for another is guilty of no neglect or delay, he will not be chargeable with interest."

The principle that one who has not agreed to pay interest is nevertheless chargeable with it from the time of his default in making payment is undoubtedly the law in this country. In Chicago v. Tebbetts, 104 U. S. 120, 125, 26 L. Ed. 655, the principle was recognized and applied that a party guilty of unreasonable and vexatious delay in making payment is chargeable with interest from the time the debt became due, and is not relieved by offering to pay interest from the time when the delay began to be unreasonable and vexatious. In that case the delay was accompanied by litigation; as the court put it, the city had litigated and contested the demand year after year and in court after court.

In 22 Cyc. 1498, it is said to be the rule that interest is allowed as damages where there has been unreasonable and vexatious delay in making payment.

We do not, however, have to consider what limitations, if any, attach to the doctrine above announced in so far as the Recording Company's claim to interest is concerned; for we are dealing with an express agreement which the parties made as to the payment of interest. In 16 Am. & Eng. Encyc. of Law, p. 1053, it is laid down that—

"As a matter of course, where the interest of the parties as to the rate after maturity is expressed in the contract, such rate, if not illegal, will in general control."

This is the law of New York; the courts holding that, when a contract provides that interest shall be paid at a specified rate until the principal is paid, the contract rate governs until the payment of the principal, or until the contract is merged in a judgment. Taylor v. Wing, 84 N. Y. 471; O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64.

In Holden v. Trust Co., 100 U. S. 72, 25 L. Ed. 567, the maker of a note agreed to pay it, with 10 per cent. interest. The court held that interest should be computed at that rate up to the maturity of the note, and thereafter at 6 per cent. After calling attention to the fact that the agreement of the parties extended no further than to the time fixed for the payment of the principal and was silent as to everything beyond that, the court said:

"If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has

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been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intendment cannot be inferred."

And see Brewster v. Wakefield, 22 How. 118, 16 L. Ed. 301; Bernhisel v. Firman, 22 Wall. 170, 22 L. Ed. 766. If the local law is different, the federal courts will follow it. Cromwell v. County of Sac, 96 U. S. 51, 61, 24 L. Ed. 681; Ohio v. Frank, 103 U. S. 697, 26 L. Ed. 631. In New Orleans v. Warner, 175 U. S. 120, 147, 20 Sup. Ct. 44, 44 L. Ed. 96, the agreement was that if the warrants were not paid upon the date fixed for presentation they should bear interest at the rate of 8 per cent. until paid. The court, after referring to Holden v. Trust Co., supra, and the other cases cited, said:

"These very cases, however, recognize the principle that, if the parties themselves have fixed a rate to be paid up to the time of payment, that rate will be respected. In this case both the statute and the warrants provided that such warrants shall bear interest at the rate of 8 per cent. 'until paid,' and we are therefore of opinion that complainant is entitled to that rate from November 26, 1894, the date of filing the bill and issuing the subpœna."

The commencement of the suit was a sufficient demand to charge the defendant with interest from that day.

When the agreement is for the payment of interest at a certain rate until the note is paid the parties have agreed upon the amount of the damages to be paid because of the nonpayment of the principal at maturity. Reeves v. Stipp, 91 Ill. 609. In Browne v. Steck, 2 Colo. 70, the note sued on provided for interest at the rate of 10 per cent. per month from maturity until paid. The court regarded the rate specified as prima facie sufficient to establish the measure of damages for the breach of the contract. This was followed in Buckingham v. Orr, 6 Colo. 587, 591, 592. In Daniel on Negotiable Instruments (6th Ed.) vol. 2, § 1458, that authority says:

"And if the note runs with a certain rate of interest until paid that rate, if legal, runs after maturity as before."

And see Augusta National Bank v. Hewins, 90 Me. 255, 38 Atl. 156; Jennings v. Moore, 189 Mass. 197, 75 N. E. 214; Seymour v. Continental Life Ins. Co., 44 Conn. 300, 26 Am. Rep. 469. We conclude therefore that in an action at law if the parties agree upon the rate of interest until the money is paid, or until date of payment, that agreement is controlling and fixes the measure of damages upon default.

But this is not an action at law. It is a suit in equity, and the question arises whether the same rule is to be applied that would be applicable if the action had been at law. The courts of equity have long had certain rules which they applied to certain classes of cases. If a trustee was guilty of unreasonable delay in investing the trust fund or in transferring it to those destined to receive it he was compelled to pay interest to the cestui que trustent even where it was not prayed by the bill. An executor or administrator whose duty it was to pay the testator's obligations as soon as he had assets collected which were

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sufficient for the purpose was himself charged with interest at the same rate the obligations bore. And if he failed to account promptly to the residuary legatee for the surplus of the estate he himself had to pay interest for the balance improperly retained. So if a trustee of a bankrupt's estate neglected to pay a dividend to the creditors, equity required him to pay interest from the time when the breach of duty commenced. A trustee could not make a profit out of his trust, and if in breach of his duty he used the trust fund in trade, the cestui had the option of taking either interest or the actual profits which might have been realized. Sometimes he was charged in England with 4 per cent. and sometimes with 5 per cent. interest, and sometimes with compound interest, according to the circumstances of the case. In this country the trustee who has been guilty of misconduct has been usually charged the legal rate of interest. But the class of cases to which reference has been made have been cases where interest has not been derived from any contract or agreement or statute, but in accordance with the well-established principles of equity jurisdiction. And we are dealing here with an actual agreement fixing the rate of interest to be paid from a specified date "to the date of payment."

We are not aware that equity will construe such an agreement differently from the construction placed upon it at law. The construction to be placed on the language of contracts is the same both at law and in equity. Jersey City v. Flynn, 74 N. J. Eq. 104, 70 Atl. 497; 13 C. J. 521. And contracts for interest are governed by the same rules of construction and interpretation as are other contracts. 16 Am. & Encyc. of Law, p. 1001. In 22 Cyc. 1475, it is said:

"The courts of equity, in decreeing or refusing interest, generally follow the law; but interest is sometimes allowed by courts of equity, in the exercise of a sound discretion, when it would not be recoverable at law."

We find no reason and no authority for saying that equity will not follow the law in giving effect to the agreement of the parties as to the rate of interest with which the defendant was to be charged "to date of payment." In Ex parte Fewings, supra, the agreement was to pay at the rate of 5 per cent. per annum so long as the principal or any part thereof remained unpaid. The claim was reduced to judgment, and in England judgments carry interest at the rate of 4 per cent. The Chief Judge in Bankruptcy held that, where the parties had expressly agreed that the rate should be 5 per cent. until paid, the creditor would be entitled to that rate after judgment and until paid. The Lords Justices of the Court of Appeal reversed the holding, and held that the true construction was that interest at the rate of 5 per cent. should be paid so long as any part of the principal remained due under the contract, so long as the contract for payment remained in force, but that the contract came to an end when judgment was entered and the liability under it was gone, being merged in the judgment, so that it could not therefore be said that there was an agreement to pay 5 per cent. So in the case now under discussion the rate of 2 per cent. continues until the decree is entered.

We must conclude from what has been said that the decree was

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erroneous in so far as it awarded to the Recording Company interest at the rate of 6 per cent. per annum on the sum of $786,823.93 from December 28, 1917, to the entry of the decree. The Recording Company would have been entitled under the agreement of September 14, 1917, to interest at the rate of 2 per cent. per annum from November 1, 1917, to the entry of the decree, if it had not been for the agreement of December 22, 1917. By that agreement the Recording Company assigned to the Agency Company one-half of the interest it should receive upon the moneys withheld by the defendant. The decree should have provided for the payment to the Recording Company of one-half the interest on the sum of $786,823.93 at the rate of 2 per cent. per annum from November 1, 1917, to the entry of the decree.

[5] We now come to the interest the Agency Company was entitled to receive. Upon the trial the Agency Company urged (1) that it was entitled to interest on the entire $1,500,000 from the time the several installments thereof fell due to December 22, 1917, and thereafter on $713,176.07 to the date of decree, at the rate of 6 per cent. per annum, and also one-half of any and all interest which the Recording Company might be entitled to receive from the defendant; or (2) if that be denied, that defendant be required to account to the Agency Company for the profits realized by the defendant from the use of the funds in its business and that the plaintiff should also receive one-half of any and all interest which the Recording Company might be entitled to receive from the defendant; or (3) if neither of these contentions should be upheld, that it was entitled to interest at the rate of 6 per cent. per annum on $713,176.07 from December 28, 1917, to the date of the decree, and, further, one-half of any and all interest which the Recording Company might be entitled to receive from the defendant.

The District Judge held that the Agency Company was not entitled to interest on its $713,176.07 until after the December settlement and the Agency Company's demand on December 28, 1917. From that date he held the Agency Company entitled to interest from the defendant on its $713,176.07 at the rate of 6 per cent. per annum. He also held that it was entitled, in pursuance of the terms of the agreement of December 22, 1917, between the Agency Company and the Recording Company to one-half of the interest on the Recording Company's $786,823.93 from November 1, 1917, to December 28, 1917, which defendant was under obligation to pay to the Recording Company at the rate of 2 per cent. per annum, and the decree so provided. Neither of the plaintiffs have appealed, but the defendant in its appeal disputes the allowance of interest.

From what has been said it appears that the Agency Company was entitled to one-half of the interest which the Recording Company is to receive on $786,823.93 from November 1, 1917, to the entry of the decree, instead of to December 28, 1917, as the lower court directed. But with that question determined there remains to be settled the question concerning the interest on $713,176.07, which we have seen is due to the Agency Company out of the $1,500,000 retained by the

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defendant. While the defendant agreed to pay interest at the rate of 2 per cent. per annum on the sum of $786,823.93 due to the Recording Company, it never expressly agreed to pay any interest on the $713,176.07 due to the Agency Company; and in the agreement of December 22, 1917, wherein the Agency Company and the Recording Company adjusted matters as between themselves, it was stated that there was due to the Agency Company "a balance of $713,176.07 and one-half of any and all interest which the Recording Company may receive upon the moneys withheld by the American Can Company" the defendant herein. It is evident for reasons we are not concerned with that it was not contemplated that interest should be paid by the defendant to the Agency Company on the balance of $713,176.07. Under these circumstances the defendant was not chargeable with interest until it placed itself in default, but from that time it was chargeable with interest at the legal rate.

We have pointed out in an earlier part of this opinion that the High Court of Chancery from early days compelled trustees to pay interest when they withheld the trust fund. That practice our equity courts followed. In Gray v. Thompson, 1 Johns. Ch. 82, Chancellor Kent charged a trustee with interest on a trust fund which he had failed to distribute, because he rendered no sufficient excuse for not distributing it as it was his duty to have done. Other cases in equity might readily be cited. And in this country our courts have applied the principle in actions at law. The general rule is stated in 22 Cyc. 1505, where the authorities are collected. It is there said:

"Where money belonging to another is not paid over to the person entitled to receive it at the time it should be paid over, interest is generally allowed as damages for such wrongful withholding thereof."

And in 22 Cyc. 1514, it is also said, citing the authorities, that:

"Where the amount of the demand is sufficiently certain to justify the allowance of interest thereon the existence of a set-off or counterclaim which is itself unliquidated will not prevent the recovery of interest on the balance of the demand found due from the time it became due."

And where the amount of a demand is definitely agreed upon by the parties, interest will be allowed from the date of such liqulidation. Thomas v. Wells, 140 Mass. 517, 5 N. E. 485; Clark v. Dutton, 69 Ill. 521; Hoagland v. Segur, 38 N. J. Law, 230.

We do not overlook the fact that, where the amount demanded is disputed on reasonable grounds and in good faith, interest will not be allowed on the demand until the right thereto is authoritatively determined. We think, however, that it was the duty of the defendant to pay when it was properly informed that the parties "had arrived at a final settlement" and demand of payment was made on December 28, 1917. The defendant's refusal to pay without a lawsuit is not to be excused by any of the circumstances of the case. We therefore agree with the court below that the Agency Company is also entitled to interest on its $713,176.07 at the rate of 6 per cent. per annum from December 28, 1917.

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In what has been said concerning interest we have pointed out the principles which should have been applied to the case by the District Judge at the time the decree was entered. The situation is not now what it was at that time, because of the failure of either of the complainants to appeal from the decree. The result is that neither of the complainants is entitled to ask the court to increase the amount of interest which it is entitled to receive from the defendant up to the entry of the decree. This court has made no calculation for the purpose of determining the exact amount of interest the complainants would have received under the decree as entered and under the decree as it should have been entered if the correct principle had been applied. We have indicated in what the error consisted; and if it appears that the rectification of the error will reduce the amount of interest due from the defendant the decree must be modified accordingly.

As the Agency Company did not appeal, it is strictly entitled to claim only one-half of the 2 per cent. interest which the Recording Company will receive from the defendant on $786,823.93 from November 1, 1917, to December 28, 1917; that being the amount awarded to it under the decree below. But the counsel of each complainant has asked the court to settle the question of interest as between the two complainants as though each had appealed. In compliance with that suggestion the Recording Company must be directed to pay over to the Agency Company one-half of the 2 per cent. interest to be received from defendant on $786,823.93 from November 1, 1917, to the entry of the decree.

The case is remanded to the District Court, which is directed to proceed in accordance with this opinion.

(258 Fed. 377)

THE ADAH.

Appeal of BEER, SONDHEIMER & CO. et al.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 156.

1. SHIPPING ⟸126—DISCHARGE OF CARGO—NEGLIGENCE OF CONTRACTING STEVEDORE.
   A stevedore, contracting to discharge a ship into lighters or scows, although his contract does not include trimming cargo, is bound to stop work, if and when it becomes unsafe to continue loading without trimming, and is liable to third parties injured, if he proceeds.
2. SHIPPING ⟸126—NEGLIGENCE IN DISCHARGING—LIABILITY FOR INJURY TO VESSEL.
   A cargo owner, who has agreed to discharge the vessel, is not liable as principal for negligence of a stevedore with whom he contracts for such discharge, but is liable on his contract with the vessel for any injury to her resulting from such negligence.
3. SHIPPING ⟸209(1)—PROCEEDING FOR LIMITATION OF LIABILITY—PERSONS BOUND BY DECREE.
   Parties to a proceeding for limitation of liability, who voluntarily ap-

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pear or, after they are brought in, whether rightfully or not, join issues with petitioner and between themselves, and litigate questions of liability, are bound by the decree.

Appeal from the District Court of the United States for the Eastern District of New York.

Petition of Charles A. Fox, owner of the deck scow Adah, for limitation of liability. From the decree Beer, Sondheimer & Co. and Brady & Gioe, Incorporated, appeal. Affirmed.

In April, 1915, the petitioner, Fox, owned the scow Adah. This vessel is the usual type of harbor deck scow, 94 feet long on the flat bottom, 112 feet over all, 33 feet beam, 10 foot side, and 22 inches sheer. She was to carry all her load on deck, and was calculated to be "decks to" with about 765 tons aboard. The scow herself displaced (i. e., weighed) 193 tons light (this is the average of experts' calculations) on a draught of 26 inches. The Adah was launched in December, 1914, and lay at the builder's yard until the latter part of April, 1915, when Fox chartered her to Jacobus et al., knowing that she was to be used to lighter ore, from alongside a steamer.

Beer et al. owned a large lot of ore or "copper concentrate" (a sticky clayey substance that will not run and distribute itself like sand or crushed stone) on the steamship Uller. With them Jacobus contracted to transport this ore, from alongside the Uller to its ultimate destination, but he did not undertake either the loading, discharging, or trimming of the cargo. Beer et al. contracted with the stevedoring concern of Brady et al. to load the lighters furnished by Jacobus, but the stevedores were not paid for trimming. They had offered to load at 20 cents a ton, or load and trim at 23 cents. The lower figure was accepted, and work began with no bargain or arrangement as to trimming, specifically or explicitly made with anyone by Beer, who made all the contracts looking to the transport of the concentrate from alongside the Uller to its delivery point.

Jacobus put the Adah alongside the Uller, and Brady began loading at 2 p. m. April 22d. Work proceeded night and day until 3 a. m., April 24th, when the scow had not over 743 tons on board. She was then started (stern first) from her berth alongside, and toward the bulkhead, by a line from the Uller's winch, and then hauled clear of the steamer by a line from the bulkhead. Almost as soon as her stern got into the tideway (from which the Uller previously protected her) she careened to port (or toward the tide), dumped her cargo, and turned over, striking and injuring the Uller in the process. The cargo was, of course, lost, and the Adah herself greatly damaged.

Litigation over this disaster was begun by the owners of the Uller, who sued Brady, alleging that the capsizing and consequent damage was due to negligent loading. Into this suit (in admiralty) Jacobus, Fox, and Beer were all summoned (or intended so to be) under the fifty-ninth rule, on the theory that either Beer or Jacobus was responsible as principal for whatever negligence in loading existed, or that Fox, or the Adah, or both, were liable because the loss was proximately due to unseaworthiness of the scow.

Thereupon Fox began this limitation proceeding, in which all the other enumerated parties appeared, filed claims and answered. They all joined issue with Fox by declaring the Adah unseaworthy, but Beer by answer thrust liability on Jacobus by asserting that he should have trimmed the cargo—something Jacobus denied, alleging that Brady had "assumed entire charge" of the loading, so as to keep the boat "at all times on an even keel," and further urging that in respect of proper loading Brady was Beer's agent or servant, and did load negligently.

The Uller also averred that Brady had unskillfully placed the cargo, and so contributed to disaster, while Brady denied all allegations of such negligence contained in Fox's petition, and averred that the sole cause of injury was the negligence of Fox or his agents. In some form, also, every answer contested Fox's right to limit.

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The decree below (read with the opinion) holds: (1) That the Adah was seaworthy, and not negligent, wherefore neither she nor her owner is responsible for any part of the loss or damages; (2) that negligent loading by Brady was the sole cause of disaster; (3) that Beer, as the employer of Brady, was liable to the Uller; and (4) that Jacobus was not chargeable with any duty or fault in the premises. Wherefore Brady primarily, and Beer secondarily, are declared liable for "the loss of or damage to the said cargo and to the steamship Uller." Nothing is said regarding the Adah's own damages, nor is any recovery in money decreed for or against any party, except in respect of costs.

From this decree Brady and Beer appealed, both substantially demanding a new trial, and the former specifically complaining (by assignment of error) that the court below, not only found the Adah guiltless, but "held this claimant (Brady) responsible for the damages arising out of said disaster."

Geo. V. A. McCloskey, of New York City, for petitioner.

Mark Ash, of New York City, for Jacobus and others.

Chauncey I. Clark, of New York City, for the Uller.

Harrington, Bigham & Englar, of New York City, for Beer, Sondheimer & Co.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine and John M. Woolsey, both of New York City, of counsel), for Brady and others.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The relation of Jacobus to the other parties presents no question of law. The statement of fact prefixed to this opinion sufficiently indicates that on this point we agree with the court below. Nor does the contention that Fox has no right to limit liability require discussion. Let it be admitted that, if he had chartered to Jacobus an unseaworthy boat, he could not limit, under Benner Line v. Pendleton, 217 Fed. 497, 133 C. C. A. 349, affirmed Pendleton v. Benner Line, 246 U. S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770. But that does not mean that he could not, while asserting seaworthiness, petition for the benefit of the statute; nor can it be contended that, if seaworthiness be established, he may not be declared free of liability for the injury and loss complained of.

Appellants lay much stress on the duty of petitioner affirmatively to prove seaworthiness, inasmuch as a presumption contra is said to have arisen by the admitted occurrence of accident. We do not find it necessary to consider the matter. Decision below was not reached by dealing with presumptions, nor was it rested on burden of proof or evidence. The record is very ample, and we have no difficulty in ascertaining therefrom, by a fair preponderance of credible evidence, why the Adah capsized.

We hold it proven that the scow was well built, new, of approved design, and did not leak. More particularly it is proved that lying light in winter weather at the yard did not cause her seams to open. It follows that, until she took it in over her rail, there was no more water in her than is usual in a new and well-built boat of her class.

When a tight boat capsizes in calm water, the inference is almost irresistible that her action is due to the disposition of her load. But we do not rest on the inference; it is positively proven, and by Mr. Brady himself, that no trimming was done, the material was dumped

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approximately amidships, and left to "run when it got piled high enough," but only the "dry part would run." And by other witnesses it is shown that before a full load was put on the Adah the deck was awash on the port side, and she was heavy by the stern. We find that this was the reason why the 25 tons additional that she ought to have carried were never put aboard, and why she was removed from the Uller's side. We also accept the testimony that this combination of longitudinal and transverse unevenness is peculiarly dangerous, and find that the Adah was in such a condition of instability that the oscillations caused by hauling her across the tide (slight as they must have been) were enough to tip her over.[1]

[1] Under Boret v. Robert R., 255 Fed. 37, 166 C. C. A. 365, the stevedores were held primarily liable for the damage resulting from such bad loading. It was there held that a stevedore, under exactly the same contract as is here admitted, was bound to stop work when and if it became unsafe to continue loading without trimming. He may call on his principal or employer to do the necessary work (in The Robert R., the steamship; in this case, the cargo owner), but he proceeds in a work endangering others at his individual peril; and the fact that his paymaster, when engaging him, economized by refusing to pay for trimming, does not relieve the stevedore who loads badly (i. e., out of trim), and though it may emphasize it does not cause any liability to third parties, on the part of the economic employer.

[2] In this case Brady (like the stevedores in The Robert R., supra) is an independent contractor, the relation of principal and agent does not exist, nor was the work contracted for inherently or necessarily dangerous. The ship in The Robert R. was liable for lost cargo as a carrier; i. e., in contract. In this case Beer is responsible contractually to the Uller for negligence in carrying out his agreement to remove the cargo from her hold and safely put in overside.

[1] The record contains much scientific or mathematical evidence which has not been overlooked. The effort was to demonstrate that such a vessel as the Adah, with no greater inclination than was testified to by extremely unscientific observers, could only capsize through action of free water in the hold—because her metacenter, when careened as stated, must have remained several feet (calculations vary) above the center of mass or gravity. The witnesses doubtless testified fairly from the data furnished. But we think it was always assumed that the load was symmetrical (i. e., that on an even keel the center of mass was in the same vertical as the center of buoyancy), and no allowance was made for the effect of water coming over the deck—though one witness (Mr. Kindlund) admitted that such event would make against stability. Any water over the deck edge "diminishes resistance to inclination." The Royal Sceptre, 187 Fed. 228.

As this vessel was loaded heavily to port, it is obvious that misplaced weight on deck could produce the same result as free water in the hold, while as soon as the cargo began to slide the situation would be aggravated. It may be true, as estimated by Mr. Rodemund, that the entire cargo would not spill until a heel of 45 per cent. was reached, but, with one side under water, that inclination would speedily be reached, through partial slides of cargo and the downward pressure of water above deck level.

For a simple statement of the problems of buoyancy and stability (with special reference to vessels of rectangular cross-section), see "Naval Construction" by R. W. Meade, U. S. N.

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We have before us no pleading or decree claiming or adjudging liability on Beer's part for the Adah's damages. For them on this record Brady is responsible; further we express no opinion.

[3] Appellants finally allege error in decree below, because it not only absolves the Adah from blame, but fixes upon Brady and Beer responsibility for the loss and injury in respect of which the Adah filed this petition.

Whether it was necessary, in absolving the Adah, to fix blame on some one else, is a question we need not decide. Nor are we concerned with the inquiry whether the court could have compelled some of the parties to this appeal to come into the limitation proceedings. It is enough that they did come in, and made parties of themselves. Some of them (perhaps) came in voluntarily, but (as hereinbefore shown) all deliberately raised issues with each other, as well as with the petitioner, Fox, and litigated those issues at great length.

Having become parties, they are bound by the decree entered in the suit wherein they are parties.

"Parties in the larger legal sense are all persons having a right to control the proceeding, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision if an appeal lies."[2]

All the persons, firms, and corporations before this court in this matter fully respond to this definition. How or why they became parties is immaterial; they have had their day in court, and their relative rights have in substance been properly adjudicated.

The decree appealed from is affirmed. The only costs allowed will be the costs of this court to the petitioner, Fox, and against the appellants.

[2] This definition from Greenleaf on Evidence has been approved in Green v. Bogue, 158 U. S. 503, 15 Sup. Ct. 975, 39 L. Ed. 1061, and substantially adopted in Ashton v. Rochester, 133 N. Y. 193, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619.

The action brought by the Uller is still pending in the Southern district of New York. If the action of some of the parties there impleaded in appearing and answering to this limitation in the Eastern district be thought voluntary, see Straus v. American Publishers' Ass'n, 201 Fed. 310, 119 C. C. A. 544.

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(258 Fed. 382)

MONTGOMERY et al. v. PACIFIC ELECTRIC RY. CO.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1919.)

No. 3236.

INJUNCTION ⟸101(3)—GROUNDS—STRIKES—ORGANIZATION OF LABOR UNIONS.

Where the contracts of employment between an electric railroad company, in part engaged in transporting war material and munitions workers, and its employés, provided that employés shall not be members of a labor union, and the grand officers of certain railroad brotherhoods attempted to unionize such employés and order a strike, not by recommending or advising or persuading the members to breach their contract in which they were engaged by any peaceful or lawful means, but by threats, opprobrious epithets, and insults, to such an extent that it became necessary for the commanding officer of the United States submarine base in the neighborhood to give proper warning against interference with traffic, and to station naval guards on each car, a bill for an injunction will lie, in view of Act Oct. 15, 1914.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Suit by the Pacific Electric Railway Company against M. E. Montgomery and others for an injunction. A preliminary injunction was granted, and defendants appeal. Affirmed.

Herbert D. Gale and D. L. Cobb, both of Los Angeles, Cal., for appellants.

Oscar Lawler, Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, Cal. (W. R. Millar, of Los Angeles, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The learned counsel of the appellants says in his brief that the questions involved on this appeal are:

"Whether or not men who labor have the right to organize, and when so organized to collectively leave the service of the employer, for the purpose of improving working conditions, obtaining more pay, and the adjustment and redressing of grievances, and at the same time to induce and persuade others, by lawful means, to refuse to work under such conditions. Perhaps it would be more to the point to say that the question involved is whether or not labor, in its strife for betterment, is protected by the Clayton Act, every provision of which is violated by the temporary injunction issued by the District Court. * * *

"So plainly are the terms of the restraining order and temporary injunction at variance with the provisions of the Clayton Act and the decisions of our appellate courts that it was apparently conceded before the District Court that the order and injunction would be erroneous, were it not for the decision in the case of Hitchman Coal & Coke Co. v. Mitchell et al., 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1912C, 497, Ann. Cas. 1918B, 461, the form of the order in which case was followed in the present case. At first glance the action of the District Court in the case at bar, although a death blow to the legitimate aspirations of organized labor, seems, in a measure, justified by the decision in the Hitchman Case; but a closer study of that case fails to bear out that first impression. The injunction approved by the Supreme Court

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in the Hitchman Case does the same violence to the provisions of the Clayton Act as does the order at bar, but the Hitchman Case was originally begun in the District Court in October, 1907, while the Clayton Act did not become a law until October 15, 1914. No mention is made of the Clayton Act in either the majority or dissenting opinions in the Hitchman Case, and it seems, therefore, fair to conclude that the Supreme Court decided that case upon the condition of the law existing at the time of its commencement, and not upon the condition existing at the time of the decision, after the passage of the Clayton Act. It seems highly improbable that the Supreme Court intended to nullify an act of Congress, and to substitute its own arbitrary rule for legislative provisions. Certain it is that the provisions of the Clayton Act and the decision in the Hitchman Case cannot be reconciled."

The preliminary injunction here appealed from was preceded by a temporary restraining order, based upon a verified bill, which, in substance, alleges among other things that the complainant, appellee here, is a common carrier of persons and property over its lines of railroad in the counties of Los Angeles, Orange, San Bernardino, and Riverside, and is engaged in interstate commerce, carrying a large number of passengers and handling a large tonnage of freight between points in the state of California and points in other states and territories of the United States and foreign countries, employing upwards of 1,500 men in and about its business, and having a daily gross income of more than $20,000; that the defendants Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Engineers are unincorporated associations, having headquarters at Cleveland, Ohio, the defendants Montgomery and Farquharson, appellants here, being residents of that city, and respectively grand officers of the brotherhoods mentioned, and that the other appellants are the officers and agents at Los Angeles; that during the war the United States established posts and encampments at Arcadia and Ft. McArthur, on the appellee's railroad lines in Los Angeles county, to and from which troops and supplies are being constantly transported, and that the maintenance and operation of the appellee's said railway systems unimpaired is essential; that during the war large shipyards engaged in emergency shipbuilding for the government have been established at Long Beach and San Pedro, on the lines of the appellee, and because of lack of housing facilities at those places it is necessary for upwards of 5,000 workmen, employed at such yards, to travel daily between the cities of Long Beach and Los Angeles and their places of employment; that without the constant, continuous, and adequate service of the complainant for the transportation of such labor to and from such shipyards their activities would be seriously impaired; that at El Segundo, on the complainant's line of railway, there is a large oil refinery, the products of which are required for the operation of steam railroads under the control of the government, and engaged primarily in serving urgent war needs, and that the appellee is being urged by the government to expedite deliveries of such oil from said refinery for the use of such steam roads; that for more than five years prior to, and at the time of the filing of the bill, it had been and was the fixed policy of the appellee to prevent unionizing its employés, and that by the terms and conditions of the contract of employment with each of its employés it

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was agreed that the latter should deal directly with its employer, and not through any union or alleged representative body; that the appellants, well knowing such terms of employment, had by false representation, coercion, threats, inducements, and persuasions conducted a campaign among the employés of the appellee for the purpose of creating a union or organization of the latter, taking over all rights of said employés in dealing with their employer and denying to the latter its right to deal with each employé individually; that as a result of such campaign more than 1,200 of the employés of the appellee had been induced to unite themselves with the appellants Montgomery and Farquharson in an agreement to the effect that they would thereafter refuse to deal with the appellee as individuals, and only as an organization, and that upon any refusal of the appellee to accept such new status, or to recognize their said organized form, or to accede to any of their demands, such employés would strike and withdraw from the service of the appellee, and from the performance of the public duties in which, by, through, and with the aid of said employés, appellee had been and was engaged; that the appellants had accomplished the organization and unionizing of more than 1,200 of the appellee's employés, and had procured a vote by which it had been resolved and determined between the appellants and the said employés that unless the appellee would discontinue its said policy of dealing only with its employés directly, and unless it would agree to recognize such organization, and treat and deal with the latter regarding contracts of employment between itself and its individual employés, the said employés would on the 2d day of July, 1918, at 7 o'clock p. m., strike and withdraw from the service of the appellee; that the withdrawal of the said employés, or any considerable number of them, from such service as so threatened, would interfere with and obstruct the performance of the appellee's duties as a common carrier and the transportation of federal troops and supplies for war purposes, and would interfere with the service of appellee as a war utility, and inflict great and irreparable injury; that the appellants in furtherance of their said plan had used coercion, threats, and various persuasions upon the said employés of the appellee, and had by and through their agents, during the 30 days preceding the filing of the bill, interfered with and attempted to interfere with such employés of the appellee for the purpose of organizing and unionizing them, without the consent of the appellee, by representing and causing to be represented to such employés, and to persons who might become such, that they would be likely to suffer some loss or trouble in continuing in or entering the employment of the appellee, because the latter would not recognize the union and was running a nonunion railroad; that the appellants had, during said 30-day period, in aid of their purpose to cause the employés of the appellee to break their contracts of service, enticed them to leave the service of the appellee for the reasons stated, and had entered upon the grounds and premises of the appellee, and into its cars, for the purpose of interfering with and hindering and obstructing the said business of the appellee, and had there and elsewhere by threats, intimidation, and persuasion, and by abusive lan-

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guage, attempted to compel and induce such employés to refuse and fail to perform their duties, and to leave the service of the appellee, and to compel persons seeking employment with the appellee not to accept such employment; that all of the said acts of the said appellants were designed and would have the effect of preventing the said employés of the appellee from peaceably or otherwise prosecuting their work.

In response to an order to show cause why a preliminary injunction should not be granted, the matter came on for hearing, at which time there was presented to the court an affidavit of the defendants Montgomery and Farquharson, setting forth, among other things, that in the early part of May, 1918, the employés of the complainant company commenced to organize themselves into unions as divisions and lodges of the brotherhoods that have been mentioned, which work was carried on with the assistance of the brotherhoods and their representatives until suspended by the temporary restraining order of the court issued July 2, 1918, and during which time about 1,300 of such employés had joined the brotherhoods freely and voluntarily and without any threat or coercion; that each and every place mentioned in the complaint as the location of military camps, posts, and shipyards is reached and served by the Southern Pacific Railroad, the officials and superintendents of which road the affiants caused to be notified of the impending strike at least six hours before such strike was called; that during the month of June, 1918, the complainant discharged from its employ more than 30 men, specifically named, who had joined one of the brotherhoods mentioned, in each case refusing to give such employé a hearing, and in respect to many of them saying or intimating that the discharge was because they joined the brotherhood; that on the 25th of June, 1918, the affiants, as representatives of the said 1,300 employés, requested a conference with the president of the complainant company upon the subject, which conference was, on June 27, 1918, refused, and that—

"because of the refusal of plaintiff corporation to recognize and deal with said 1,300 employés through the representatives of their respective organizations, and because of the discharge without just cause or hearing of said mentioned members, and because of other grievances and for the purpose of obtaining such recognition and redress of grievances, there was submitted to said 1,300 members and other operative employés the question of whether or not they would leave in a body the employment of the plaintiff corporation; that between June 29, and July 2, 1918, more than 90 per cent. of said membership voted in favor of leaving the employment of plaintiff in a body, and in accordance with such vote a strike was declared and called, to take effect on July 2, 1918, at 7 o'clock p. m., on which date and hour said 1,300 members withdrew from the service of the plaintiff corporation in a body; that the restraining order issued herein was served on affiants and some of their codefendants at about 9:30 p. m. July 2, 1918, and that by reason of such restraining order, and pursuant to the policy of said brotherhoods, the strike already voted, called, declared, and effective, was ordered to be suspended until the further order of the court; that upon the suspending of said strike a considerable number of said membership reported to the plaintiff for duty, and in a large number of instances were not allowed to return to work; that upon the voting and declaring of said strike, instructions were issued to the membership of said two brotherhoods regarding their conduct during such strike, a

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copy of which instructions is hereto attached and marked Exhibit B and made a part of this affidavit."

The affidavit above referred to also stated that on July 3, 1918, the defendants, as representatives of the 1,300 employés mentioned, offered through a committee appointed by the Governor of California to submit the controversy to the arbitration of any federal board and to abide the award made by such board, which offer was refused by the complainant; that on July 4, 1918, the affiants as such representatives offered to United States Commissioner of Conciliation, C. T. Connell, to submit the controversy to the United States War Labor Board, and to that end delivered to him a letter which is set out in the record.

The refusal by the complainant of the requested conference with it was made by a letter of its president and general manager, Paul Shoup, of June 25, 1918, addressed to the defendants Montgomery and Farquharson as representatives of their respective brotherhoods, in which it was stated by the president and general manager of the complainant as follows:

"No benefit can be derived from conference such as you suggest, you representing the Brotherhood of Locomotive Engineers and Brotherhood of Railway Trainmen, and accompanied by committees representing employés of this company, for the reason that this company does not recognize your organizations, or any other outside organizations, in connection with its relations with its employés, which have been agreeably maintained for many years, and any such conference would therefore merely lead to misunderstandings.

"The inclosed circular, issued to our employés under date of June 5, 1918, expresses the position of the company."

On the hearing and in support of the application for a preliminary injunction the affidavit of Mr. Shoup was introduced, in which it was shown, among other things, that he then was and since 1910 had been the principal executive in charge of operations of the complainant company, during which time he had never declined to meet its employés and discuss with them any subject of mutual interest; that no demand had ever been made upon him for increase in their wages, but that increases had been voluntarily made, without request, from time to time, and in amounts specifically stated in his affidavit; that no controversy over question of hours of employment had been brought to him for consideration, and that the complainant was not then and never had been one of the federal controlled roads, but, on the contrary, was expressly excluded therefrom by act of Congress (Act March 21, 1918, c. 25, 40 Stat. 451, § 1 [Comp. St. 1918, § 3115¾a]), notwithstanding which it had—

"voluntarily raised the wages of its motormen and conductors, all of whom are paid by the hour, to the extent prescribed by the hourly wage basis set forth in Director General's Order No. 27 of May 25, 1918, controlling wages on the lines under federal control, and that in addition, where such employés less than five years in service received additional compensation under the Pacific electric scale through added years of service since 1915, the wage increase had been allowed on the basis of the increased scale, though the same position in work be occupied."

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That affidavit proceeds as follows:

"And further that he has by circular told every employé of the company if in doubt to check the increased wages allowed against the scale given in Director General's Order No. 27, to see that the promise that increase should be on that basis is carried out, and that copy of Order No. 27 has been filed at the information bureau of the Pacific Electric Railway Company at Sixth and Main streets accordingly; and with reference to statement made in letter by Messrs. Farquharson and Montgomery, that said promise is not being lived up to by the Pacific Electric Railway Company, alleging certain action by the Council of National Defense having bearing upon the situation, states that he has telegraphed W. V. Hill, Assistant Manager, American Electric Railway Association, War Board, Washington, D. C., as per copy of telegram attached, and received reply from Mr. Hill as per copy of telegram attached, showing that the action referred to had no bearing whatsoever upon the wage scales of electric railways.

"And, further, that the Adamson Act, to which reference has been made in correspondence by Messrs. Farquharson and Montgomery, specifically excludes interurban and street railways.

"And, further, that there is no question as to wages or hours between the employés of the Pacific Electric Railway Company and the company, and that he has not declined to mediate cases of certain employés, numbering 25 or more, dismissed from service in the months of May and June, but, on the contrary, these dismissed employés did not come to him, but instead through channels unknown to him applied to the Secretary of Labor, and on June 22d he received a letter from Charles P. Connell, United States Commissioner of Conciliation (copy attached) in relation to these cases; that Mr. Connell had then to go to San Francisco, and on Thursday afternoon, June 27th, telephoned that he had returned, but would have to leave that night for Salt Lake City, and to wire him of any developments, and that on June 29th he wired Mr. Connell at Salt Lake that he had completed investigations and would be ready to discuss each of them with Mr. Connell on the latter's return, and that Mr. Connell made an appointment by wire from Salt Lake, July 2d, stating he would call on Friday, July 5th, at 10:30 a. m., for such discussion, which he did, and that each and every case was gone over thoroughly at that time, with all of the evidence leading up to the dismissal of each man presented to Mr. Connell for his consideration, and that decision will in a very few days be reached as to the disposition of these cases.

"And, further, that none of these dismissed employés have called upon the president to consider their cases, with the exception of three, who made appointment for 2 o'clock, Thursday, June 27th, and were at that time received by him and their cases discussed, with the conclusion, expressed by Mr. Shoup, to which there was no objection made by the employés, that inasmuch as the cases generally were up for consideration with Mr. C. F. Connell, it would probably be best to take care of all of them through that channel.

"And that the only other question before him at this time, dealing with the relations of the employés to the company, is a request, not from the employés, but from the vice president of the Brotherhood of Railroad Trainmen and vice president of the Brotherhood of Locomotive Engineers, claiming to represent a large number of the motormen and conductors of the company, and demanding under date of July 2d, said demand being presented by letter to the office of affiant shortly after noon of that day, and later delivered to affiant personally about 1:20 p. m., that the organizations of the Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Engineers be recognized, together with certain other demands concerning members of such brotherhoods, and that, if not, the motormen and conductors of the Pacific Electric Railway, in so far as they were members of such organizations, would be withdrawn from the service of the company at 7 o'clock p. m. on that date; and, affiant declining to recognize these organizations, the threat to withdraw these men from the service of the company was carried out, to the extent of the power of the two vice presidents of the organizations named, at that hour."

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The record shows that the defendants Montgomery and Farquharson, on behalf of their respective brotherhoods, notified Shoup at 1:30 p. m. of July 2, 1918, that, in the event the organization was not recognized, a strike would be called 5½ hours later, which was done. The record also shows that for several weeks preceding the strike the employés of the company were urged to join the unions, and were told, among other things, that they would be "eating dirt off the streets" in the event they failed to do so; that such of the employés as remained at work notwithstanding the strike order were subjected to threats, opprobrious epithets, and insults by members of the associations, and that the senior United States officer in command at San Pedro placed the trains of the complainant company under military guard, issuing the following order:

"To All Persons Concerned:

"1. Because the United States mails must have unimpaired movement;

"(2) In order that the transportation of troops, munitions, and military stores essential to the effective prosecution of the war may not be obstructed;

"(3) To prevent slowing down the building of vessels under construction for the United States Shipping Board at or near Los Angeles Harbor;

"(4) All persons are warned—and hereby cautioned—that any interference or attempt to obstruct the free passage of freight or passenger trains or trolley cars to or from San Pedro and the Outer Harbor, over any rail line, is at their own peril. Naval guards on each car will attend to the enforcement of these instructions; and it is earnestly requested that such guards shall not be hindered or hampered in the execution of duties with which charged.

"H. C. Poundstone,
"Commander U. S. Navy, Commanding Submarine Base and
Senior Officer Present at San Pedro."

The record also shows that among the "duties of members and committeemen in conduct of strike on Pacific Electric Railway," issued by the defendants Montgomery and Farquharson on behalf of their respective brotherhoods is the following:

"(9) Members of these organizations, employed on neighboring or connecting lines, should be given to understand distinctly that they can continue to perform their usual duties on their own line, but they must not encroach in any way upon the lines of the Pacific Electric, to do work that has not been regarded as a part of their duty prior to the date the strike became effective."

The record further shows that factories engaged in packing sea foods for the United States and allied governments, docks and piers devoted to national use, and a harbor railroad owned by the city of Los Angeles and connecting with the shipyards, the submarine base, and the naval reserve camp at San Pedro, are exclusively served by the line of the complainant company.

The contention of the appellants' counsel that because the act of Congress of October 15, 1914, 38 Stat. 730, c. 323, commonly called the Clayton Act, was not expressly mentioned in either the majority or dissenting opinions of the Supreme Court in the case of Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, we should hold that the court decided that case "upon the condition of the law existing at the time of its commencement, and not upon the condition existing at the time of the decision," is wholly unsound. The exact re-

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verse is manifestly true. That the order here appealed from accords with the decision in the case cited is expressly conceded in the brief for the appellants, where it is declared that—

"the injunction approved by the Supreme Court in the Hitchman Case does the same violence to the provisions of the Clayton Act as does the order at bar.".

And again:

"Certain it is that the provisions of the Clayton Act and the decision in the Hitchman Case cannot be reconciled."

Nor is it true that the Supreme Court made in the case cited no reference to the Clayton Act; for, notwithstanding the fact that that act was pressed upon its consideration, the court, in the course of its elaborate opinion, expressly declared it "needless to say there is no act of legislation to which defendants may resort for justification."

While it is perfectly true, as is expressly declared in section 6 of that act (Comp. St. § 8835f), "that the labor of a human being is not a commodity or article of commerce," it is equally true that laborers in this country, in whatever field of operation, and whether of head or hand, are governed and protected by the same Constitution and laws that govern and protect the owners of property here. One of the things thus permitted and secured is the right of contract. The latter, freely and fairly made upon sufficient consideration, is inviolable. In the present case the complainant company made nonmembership in a union a condition of employment, and to that condition the employés in question agreed. Such was the contract of the parties. Speaking to that point in the Hitchman Case, the Supreme Court said (245 U. S. 250, 251, 38 Sup. Ct. 72, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461):

"That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to 'run union' were a sufficient explanation of its resolve to run 'nonunion,' if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of 'collective bargaining,' it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union, and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make nonmembership in a union a condition of employment as the workingman is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. Adair v. United States, 208 U. S. 161, 174 [28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764]; Coppage v. Kansas, 236 U. S. 1, 14 [35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960]. In the present case, needless to say, there is no act of legislation to which defendants may resort for justification.

"Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employés, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as

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in any other legal right. That the employment was 'at will,' and terminable by either party at any time, is of no consequence."

With the contract between the complainant company and its employés the appellants Montgomery and Farquharson in their respective capacity, and others acting with them, undertook to interfere, not by "recommending, or advising, or persuading" such employés to break their contract and stop the work in which they were engaged by any peaceful or lawful means, but by threats, opprobrious epithets, and insults, to such an extent that it became necessary for the commanding officer of the United States Submarine Base at San Pedro to give public warning to all persons concerned against any interference, or attempt to interfere, or attempt to obstruct the free passage of freight or passenger trains or trolley cars to or from San Pedro and the Outer Harbor there, and to actually put naval guards on each car to enforce his command. Surely nothing more need be said to show the absurdity of the pretension that the appellants' interference with the existing contract between the complainant company and its employés was not that peaceful, lawful recommending, advising, or persuading the latter to cease work and terminate their employment, permitted by the provisions of the act of Congress of October 15, 1914 (38 Stat. 730). In speaking of similar acts in the Hitchman Mine Case, 245 U. S. 256, 38 Sup. Ct. 74, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, et seq., the Supreme Court said:

"In any aspect of the matter, it cannot be said that defendants were pursuing their object by lawful means. The question of their intentions—of their bona fides—cannot be ignored. It enters into the question of malice. As Bowen, L. J., justly said, in the Mogul Steamship Case, 23 Q. B. Div. 613: 'Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.' And the intentional infliction of such damage upon another, without justification or excuse, is malicious in law. Bitterman v. Louisville & Nashville R. R. Co., 207 U. S. 205, 223 [28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693]; Brennan v. United Hatters, 73 N. J. Law, 729 et seq. [65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698], and cases cited. Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done. And we cannot deem the proffered excuse to be a 'just cause or excuse,' where it is based, as in this case, upon an assertion of conflicting rights that are sought to be attained by unfair methods, and for the very purpose of interfering with plaintiff's rights, of which defendants have full notice.

"Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are 'peaceable'—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employés constitutes such a violation. * * *

"It was one thing for plaintiff to find, from time to time, comparatively small numbers of men to take vacant places in a going mine; another and a much more difficult thing to find a complete gang of new men to start up a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers. The disordered condition of a mining town in time of strike is matter of common knowledge.

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It was this kind of intimidation, as well as that resulting from the large organized membership of the union, that defendant sought to exert upon plaintiff, and it renders pertinent what was said by this court in the Gompers Case, 221 U. S. 418, 439 [31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874], immediately following the recognition of the right to form labor unions: 'But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution, or by standing on such rights and appealing to the preventitive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one."

In the case of Stephens et al. v. Ohio State Telephone Co. (D. C.) 240 Fed. 759, 773, 774, Judge Killits, in discussing the same general subject, said, among other things:

"The right of free speech does not give any one the privilege to force his views upon others, to compel others to listen. The right of others to listen or to decline to listen is as sacred as that of free speech. It is clear that, if one does not desire speech of another, he may as surely have his privacy therefrom as the privacy of his home. It is undeniable that the so-called right of peaceful persuasion may be lawfully exercised only upon those who are willing to listen to the persuasive arguments.

"Again, every man has the right to the pursuit of his lawful business or employment undisturbed, and any act performed with intent to disturb the full and unrestrained exercise of his faculties and wishes in such employment is plainly unlawful.

"Again, he has the right of privacy and freedom from molestation of private persons, hostile or otherwise, at his home, at his lodging, at his place of work; he has the right to walk the streets without annoyance from the unwelcome attentions of others, so long as he is conducting himself in a lawful manner. * * *

"Again, the right of one man to work is as much entitled to respect as the right of another to cease work or to strike.

"Again, the right of an employer to engage whomsoever he chooses is as strong as the right of an employé to refuse to work. * * *

"It is a safe and proper generalization that any action having in it the element of intimidation, or coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law by those lawfully empowered to enforce the law, is unlawful; every act, of speech, of gesture, or of conduct, which 'any fair-minded man' may reasonably judge to be intended to convey insult, threat, or annoyance to another, or to work assault or abuse upon him, is unlawful. Not a syllable of the Clayton Act, or of any other law, whether of legislation of Congress or of the common law, sanctions any of the incidents we have referred to. They are to be condemned as legally inexcusable; such must be the verdict of 'any fair-minded man'; nothing can be said in justification.

"These propositions are so elemental that, but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful. These personal rights to which we have alluded are, in each instance, precisely those which the striker himself would insist upon were conditions reversed. They are also so plain, and the answers to the questions involving them so certain, that one called upon to enforce the law, if he has but ordinary intelligence, will plainly fail to do his duty when in his presence a fellow citizen suffers an invasion of his rights of this character."

The order appealed from is affirmed.

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(258 Fed. 392)

KELLY et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 2978.

1. INDICTMENT AND INFORMATION ⟸171—FAILURE OF PROOF OF CONSPIRACY—EFFECT—CONVICTION OF CRIME.

Conspiracy alleged may fail in proof, as well as proved conspiracy may fail in execution; hence failure to prove the existence of a conspiracy alleged to have been formed to defraud the United States cannot affect the right, regardless of conspiracy, to prove that the fraud which was the alleged object of the conspiracy was actually committed.

2. CONSPIRACY ⟸37—CRIMINAL LAW ⟸876½—CONSPIRACY TO DEFRAUD GOVERNMENT—INCONSISTENT VERDICT.

An indictment for conspiracy to defraud the United States and one for the offense which was the object of the alleged conspiracy are for different offenses, and, where the cases are consolidated for trial, a verdict of acquittal under the conspiracy indictment is not inconsistent with a verdict of guilty under the other, although the overt acts charged in the former are some of acts relied on under the latter.

3. CRIMINAL LAW ⟸195(1)—FORMER ACQUITTAL—IDENTITY OF OFFENSES.

A plea of autrefois acquit is unavailing, unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea.

4. CORPORATIONS ⟸369—CORPORATE AGENTS—CRIMINAL RESPONSIBILITY.

It is a rule of the criminal law, as well as the civil, that corporate agencies cannot shield themselves behind the corporation, where they are the actual and efficient actors in committing a fraud or an offense, and an indictment is good which charges defendants with committing an offense "while engaged as officers, agents, and employés" of a corporation.

5. CRIMINAL LAW ⟸59(5)—INDICTMENT AND INFORMATION ⟸124(6)—CHARGING ACCESSORY AS PRINCIPAL—JOINDER OF PRINCIPAL.

Under Criminal Code, § 332 (Comp. St. § 10506), making aiders and abettors principals, one formerly known as an accessory may be charged as a principal, without joining the principal offender.

6. CRIMINAL LAW ⟸619—CONSOLIDATION OF INDICTMENTS FOR TRIAL.

Rev. St. § 1024 (Comp. St. § 1690), investing trial judges with discretionary power to require indictments charging one or more persons with different, though connected, acts or transactions of the same class of crimes or offenses to be consolidated for trial, applies to separate indictments of the same persons; one charging conspiracy to commit a substantive offense, and the other charging its actual commission.

7. CRIMINAL LAW ⟸1144(14)—REVIEW—INSTRUCTIONS ON ADMISSION AND PURPOSE OF EVIDENCE—PRESUMPTION.

It is not to be assumed in a criminal case, any more than in a civil case, that a jury cannot grasp the meaning of the court's instructions touching admissibility and purposes of evidence, even though a change in ruling in that behalf be involved.

8. CRIMINAL LAW ⟸1159(2)—SUFFICIENCY OF EVIDENCE—REVIEW BY APPELLATE COURT.

On review of the evidence in a criminal case, it is for the appellate court to determine only whether there was evidence introduced which was proper to go to the jury and legally sufficient to sustain the verdict.

9. CRIMINAL LAW ⟸1151—REVIEW BY APPELLATE COURT—DENIAL OF CONTINUANCE.

Refusal of the trial court to grant a continuance is reviewable only where it is clearly shown that there was an abuse of discretion.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In Error to the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Criminal prosecution by the United States against Dennis Kelly, Michael Leo Corbett, William H. Eberst, and William H. Kelley. Judgment of conviction, and defendants bring error. Affirmed.

Petition for writ of certiorari denied by United States Supreme Court, 249 U. S. 616, 39 Sup. Ct. 391, 63 L. Ed. —.

A. T. Seymour, of Columbus, Ohio, Ralph Crews, of New York City, and H. J. Booth, of Columbus, Ohio, for plaintiffs in error.

Robert W. Childs, Sp. Asst. Atty. Gen.

Before WARRINGTON and DENISON, Circuit Judges, and WESTENHAVER, District Judge.

WARRINGTON, Circuit Judge. Two indictments were returned in the court below, September 4, 1914, charging plaintiffs in error and certain other persons with violation of section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]) and of the Oleomargarine Act (Act Aug. 2, 1886, c. 840, 24 Stat. 209). The offense charged in the first indictment was conspiracy, and that in the second was fraud as respects the internal revenue tax of 10 cents a pound imposed upon oleomargarine manufactured and sold with artificial coloration, causing "it to look like butter of a shade of yellow." The plaintiffs in error, Dennis Kelly, Michael Leo Corbett, William H. Eberst, and William H. Kelley (hereinafter called defendants), were respondents in both indictments, with Cornelius A. Hayes and Otto S. Marckworth and, in the first indictment, were named with Mansfield B. Snevily, who, having testified before the grand jury, was not indicted; Hayes is dead, and Marckworth, having been called by the prosecution to testify, was not placed on trial. The cases were consolidated for purposes of trial. Under the conspiracy indictment or count, a verdict of not guilty was returned in favor of each defendant; but under the second indictment or count (comprising in itself a number of counts) a verdict of guilty was returned against each defendant. Sentences were pronounced, and the defendants prosecute error.

The oleomargarine in dispute was sold and distributed in the name of the Capital City Dairy Company. This company was organized under the laws of New Jersey in 1903, and its factory was located and maintained at Columbus, Ohio. The amount of oleomargarine manufactured at its plant grew rapidly, and the taxes alleged to have legitimately accrued to the government and which were not paid amounted to large sums. The validity of the indictments was tested upon motions to quash and upon demurrers. The trial occupied several weeks, and at the close of the testimony motion to direct was denied, whereupon a well-considered charge was delivered. Motions notwithstanding the verdict under the second indictment, for new trial, and in arrest of judgment, were overruled. Upon the motions to quash and the demurrers, and likewise on the motion for new trial, the court ren-

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dered elaborate opinions. One hundred and thirty-five assignments of error are presented. It is not necessary to call distinct attention to all these assignments; indeed, this could not be done within space at all reasonable. But the nature and effect of the assignments will be sufficiently understood from those specifically commented on.

1. *Verdicts Claimed to be Inconsistent.*—It is urged in behalf of defendants that the conspiracy and overt acts alleged in the first indictment so far involved the frauds alleged in the second one as to require acquittal also under it, and hence that the findings and the verdict of the jury under the second indictment are "in fundamental and irreconcilable conflict with the findings and verdict of the jury" under the first one. In thus speaking of the indictments we, of course, have in mind the consolidation of the conspiracy case, numbered 798, with the fraud case, numbered 800, for purposes of trial; but it will be convenient occasionally to distinguish the cases by their original numbers, regardless of any effect the consolidation had in converting the two indictments into counts of a single indictment. We may say, further, that while the legal sufficiency of 798 is not now important, in view of the verdict thereunder, we cannot very well dispose of the question of claimed inconsistency without alluding to the schemes, respectively, of both indictments, and at the same time disclosing our view of the sufficiency in law of 800; and this view must also be determinative of the motion to quash 800, also of the demurrer thereto, and, in connection with the question of inconsistency, the motions non obstante and in arrest of judgment.

In considering the question of inconsistency between the verdicts, it is to be observed that indictment 798 charges that continuously from September 10, 1911, to the date of presentation of the indictment (September 4, 1914), the defendants, with Hayes and Marckworth, and also the "coconspirator" Snevily, had unlawfully and feloniously conspired, combined, confederated, and agreed to defraud the United States of a large sum of money ($1,000,000), being the aggregate of divers sums accruing from day to day as the internal revenue tax of 10 cents a pound upon oleomargarine "not free from artificial coloration that caused it to look like butter of a shade of yellow," which the defendants and their coconspirator "were to cause to be manufactured and produced" during such period of time, "while engaged as officers, agents and employés of the Capital City Dairy Company, a corporation, in causing that corporation to carry on the business of a manufacturer of oleomargarine * * * and from day to day unlawfully and knowingly to cause the same to be removed * * * and sold, vended and furnished to and for the use and consumption of others * * * and to dealers in oleomargarine," without affixing or causing to be affixed any coupon stamps representing such internal revenue tax, and without otherwise paying or accounting to the United States for such tax; and a large number of transactions are set out by dates, within the time above mentioned, as alleged overt acts committed in execution of such conspiracy.

Indictment 800 comprises nine counts. Count 1 charges that from March 10, 1913, to May 1, 1914, the defendants, with Hayes and

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Marckworth (omitting Snevily), "unlawfully and feloniously did defraud the United States of a large sum of money" ($1,000,000), "being the aggregate of divers sums * * * which became due and payable to the United States from day to day during said period of time * * * as and for the internal revenue tax of 10 cents a pound upon oleomargarine * * * not free from artificial coloration that caused it to look like butter of a shade of yellow"; that the oleomargarine was manufactured by defendants "while engaged as officers, agents and employés of said the Capital City Dairy Company * * * in carrying on, for and in the name of said corporation, the business of a manufacturer of oleomargarine"; that on each week day they manufactured 20,000 pounds and removed the product and sold it for use and consumption "otherwise than upon their own several family tables," knowing it to be "oleomargarine not free from such artificial coloration," without affixing any coupon stamps representing payment of the internal revenue tax of 10 cents per pound, and without paying or otherwise accounting to the United States for such tax or any part of it. The difference between count 1 and count 2 is that the latter charges that on May 1, 1914, the defendants as individuals, not as officers or employés, though in the name of the Dairy Company, manufactured 20,000 pounds of oleomargarine with artificial coloration, as stated in the first count, and sold it for use and consumption by others without paying or making any provision for payment of the internal revenue tax of ten cents a pound. Count 3 is the same as count 2, except that the date is May 5, 1914, and that the defendants are charged with committing the acts individually, and not in the name of the Dairy Company; count 4 same as count 3, except that the date is June 6, 1914, and the amount 9,600 pounds; count 5 same as count 1, except that the date is May 11, 1914, and the amount 30,000 pounds; count 6 same as count 5 except that the date is May 15, 1914, and the amount 18,000 pounds; count 7 same as counts 3 and 4, except that the date is June 22, 1914, and the amount 18,000 pounds; count 8 same as counts 3, 4, and 7, except that the date is July 2, 1914, and the amount 24,000 pounds; count 9 differs (if it be a difference amounting to a distinction) from count 1 only in charging that defendants, as officers, agents and employés of the Dairy Company "caused" to be committed acts similar to those stated in count 1, instead of directly committing such acts themselves.

[1] There is an obvious and substantial distinction between the two indictments, in that the gist of the first is the alleged conspiracy (Williamson v. United States, 207 U. S. at page 447, 28 Sup. Ct. 163, 52 L. Ed. 278), and that of the second, in each of its counts alike, is the alleged fraud. The declared object of the conspiracy alleged, it is true, was to defraud the government of taxes identical in kind with those of which it is alleged in the second indictment the government was actually defrauded; but it is perfectly plain that two distinct offenses were alleged. Conspiracy alleged may fail in proof, as well as proved conspiracy may fail in execution. Failure, then, to prove the existence of a conspiracy alleged to have been formed to commit a particular character of fraud cannot affect the right,

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regardless of conspiracy, to prove that fraud of the same character was actually committed. This is well within settled principles of the doctrine of conspiracy. As Judge Sater pointed out in overruling the motions to quash and the demurrers to the indictments, overt acts are something apart from the mere conspiracy, citing, among other decisions, Joplin Mercantile Co. v. United States, 236 U. S. 531, 535, 35 Sup. Ct. 291, 293 (59 L. Ed. 705), where Mr. Justice Pitney said:

"It is true, as held in Hyde v. Shine, 199 U. S. 62, 76 [25 Sup. Ct. 760, 50 L. Ed. 90], and Hyde v. United States, 225 U. S. 347, 359 [32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614], that a mere conspiracy, without overt act done to effect its object, is not punishable criminally under section 37 of the Criminal Code. But the averment of the making of the unlawful agreement relates to the acts of all the accused, while overt acts may be done by one or more less than the entire number, and although essential to the completion of the crime, are still, in a sense, something apart from the mere conspiracy, being 'an act to effect the object of the conspiracy.'"

Again, it was laid down in United States v. Rabinowich, 238 U. S. 78, 85, 35 Sup. Ct. 682, 683 (59 L. Ed. 1211):

"It is apparent from a reading of section 37, Criminal Code (section 5440, Rev. Stat.), and has been repeatedly declared in decisions of this court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. Callan v. Wilson, 127 U. S. 540, 555 [8 Sup. Ct. 1301, 32 L. Ed. 223]; Clune v. United States, 159 U. S. 590, 595 [16 Sup. Ct. 125, 40 L. Ed. 269]; Williamson v. United States, 207 U. S. 425, 447 [28 Sup. Ct. 163, 52 L. Ed. 278]; United States v. Stevenson (No. 2) 215 U. S. 200, 203 [30 Sup. Ct. 37, 54 L. Ed. 157]. And see Burton v. United States, 202 U. S. 344, 377 [26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362]; Morgan v. Devine, 237 U. S. 632 [35 Sup. Ct. 712, 59 L. Ed. 1153]. The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. Williamson v. United States, supra. And it is punishable as conspiracy, though the intended crime be accomplished. Heike v. United States, 227 U. S. 131, 144 [33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128]. * * * There must be an overt act; but this need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy. United States v. Holte, 236 U. S. 140, 144 [35 Sup. Ct. 271, 59 L. Ed. 504, L. R. A. 1915D, 281]; Joplin Mercantile Co. v. United States, 236 U. S. 531, 535, 536 [35 Sup. Ct. 291, 59 L. Ed. 705]."

See, also, Goldman v. United States, 245 U. S. 474, 477, 38 Sup. Ct. 166, 62 L. Ed. 410; Louie v. United States, 218 Fed. 36, 39, 134 C. C. A. 58 (C. C. A. 9).

[2] Certainly there was no inconsistency in alleging the offenses severally charged in the two indictments. Can it be, then, that failure of proof as respects the controlling issue under either indictment can operate to defeat both indictments? The verdict of not guilty under the first and that of guilty under the second naturally signify that conspiracy was not proved under the former, but that fraud was proved under the latter. This derives special emphasis from the rule, just pointed out, that an effective overt act may be committed by one or more less than the entire number of those entering into a conspiracy, and need not constitute the very crime that is the object of the conspiracy, and indeed need not be of itself a criminal act. It results that the offense of which defendants were found guilty was

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not the same offense as the one of which they were found not guilty. This, it is true, is but another way of stating, as we have already stated, that distinct offenses were charged in the two indictments.

[3] One of the grounds set up in the motion non obstante is that to support the charges of the second indictment, 800, the government "relied mainly upon evidence concerning acts and facts which are specifically set out and described as overt acts" in the first indictment, 798. This was in effect a plea of autrefois acquit. Such a plea, however, is unavailing unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea; thus, as Mr. Justice Harlan said (Burton v. United States, 202 U. S. 344, 380, 26 Sup. Ct. 688, 698 (50 L. Ed. 1057, 6 Ann. Cas. 362), in adopting language of Chief Justice Shaw, it must appear that the offense charged "was the same in law and in fact. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact." Some of the facts leading up to the application there made of this rule are helpful. The point was presented (202 U. S. 377, 26 Sup. Ct. 697, 50 L. Ed. 1057, 6 Ann. Cas. 362) whether defendant could "legally be indicted for two separate offenses, one for agreeing to receive compensation in violation of the statute, and the other for receiving such compensation." In sustaining the view that these were separate offenses Mr. Justice Harlan said (Id.):

"There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense; or compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated."

Defendant also invoked protection under the clause of the Constitution which declares that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." The first and second counts of an indictment in a former case charged that defendant had unlawfully accepted and received certain money from a company for services rendered in its behalf in a matter before the Post Office Department in which the United States was interested; while the third count of that indictment charged defendant with having unlawfully received this money from Mahaney, an officer of the company, as compensation for the services so rendered. Defendant was convicted on the first and second counts and acquitted on the third count. Defendant pleaded this acquittal in bar of the prosecution based on the third and seventh counts of the last indictment. In its answer to this plea the government alleged that, while the third and seventh counts of the present indictment were identical in legal effect with counts 1 and 2 of the first indictment, the offense charged in counts 3 and 7 of the last one was "not identical in legal effect with said count 3 of said original indictment." Demurrer to this answer was overruled in the court below, and in sustaining such ruling Mr. Justice Harlan, speaking for the court, said (202 U. S. 379, 26 Sup. Ct. 698, 50 L. Ed. 1057, 6 Ann. Cas. 362):

"It was not alleged in the former indictment that Mahaney paid the money to the defendant in behalf of or by direction of the company. This distinc-

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tion was manifestly in the mind of the jury in the former case; for, while they found the defendant guilty of having received forbidden compensation from the company, they found him not guilty of having received such compensation from Mahaney."

And it was to this distinction that the rule before mentioned as laid down by Chief Justice Shaw was applied. The distinction thus pointed out and the application of the rule touching former jeopardy are plainly applicable to the instant case.

In Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153, the court had occasion to consider the rule against double jeopardy under petition of habeas corpus. Devine and another had pleaded guilty to an indictment containing two counts, one under section 192 of the Penal Code (Comp. St. § 10362), for unlawfully breaking into a post office with intent to commit larceny, and the other under section 190 (section 10360), for committing the larceny. Devine was sentenced for 4 years on the first count and 2 years on the second; the sentence being "cumulative and not concurrent." The other appellee was likewise sentenced for 3½ years' imprisonment and a fine of $100 on the first and 2 years on the second count. The object of seeking the writ was to be discharged from confinement at the expiration of the sentences under the first count, and the writ was granted below. Appellees claimed protection against double jeopardy forbidden by the Fifth Amendment, because the several things charged in the two counts were done at the same time and as part of the same transaction. In reversing the judgment of the District Court Mr. Justice Day said (237 U. S. 641, 35 Sup. Ct. 715, 59 L. Ed. 1153):

"As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. Without repeating the discussion, we need but refer to Carter v. McClaughry, 183 U. S. 365 [22 Sup. Ct. 181, 46 L. Ed. 236]; Burton v. United States, 202 U. S. 344, 377 [26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362], and the recent case of Gavieres v. United States, 220 U. S. 338 [31 Sup. Ct. 421, 55 L. Ed. 489]."

Upon the question whether Congress had created two distinct offenses in sections 190 and 192 of the Criminal Code, the court quoted section 1062 and the second paragraph of section 1052 of Bishop on Criminal Law; and counsel for the present defendants, relying on this as an approval of Mr. Bishop's view, make paragraph 2 of section 1052 (volume 1, 8th Ed., p. 630) the foundation for their claim of fatal inconsistency between the present verdicts. The test as there stated by Mr. Bishop is to the effect that, where two indictments have been returned, if there could have been a conviction under the first upon proof of what is set out in the second, the second indictment cannot be maintained; otherwise, it can be. We do not see that this differs materially from the rule laid down in Morgan v. Devine and just quoted; but it is to be observed, of the alternatives stated in Mr. Bishop's rule, the one adopted in Devine's Case concerning two closely related offenses is opposed to counsel's present contention.

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Counsel strenuously insist that, unless the present defendants acted in concert so as to constitute the offense of conspiracy charged in the first indictment, it was "not possible" for them to commit any of the frauds alleged in the second indictment. The most obvious answer to this is to be found in the verdicts themselves, if upon the evidence they are sustainable; if they show anything, it is that what is claimed to have been "not possible" actually happened. The same insistence was made for defendants on their motion for new trial. This was met in several ways by the learned trial judge. One was that, if the point was well taken, it would follow "that a conviction on a fraud count laid against two or more persons under section 17 of the Oleomargarine Act (Comp. St. § 6229) cannot be sustained unless it be accompanied by averments of a conspiracy"—calling attention to decisions of this court (Hart v. United States, 183 Fed. 368, 105 C. C. A. 588, and Hardesty v. United States, 168 Fed. 25, 27, 93 C. C. A. 417, and also Enders v. United States, 187 Fed. 754, 109 C. C. A. 502 [C. C. A. 7]), where a plurality of persons had in each case been jointly indicted and convicted of frauds committed in violation of section 17 of the Oleomargarine Act, and the judgments were affirmed, although, as the District Judge said, in none of the cases "did the fraud counts hint at a conspiracy."

Counsel say in their brief that the use so made of these decisions shows that the principle upon which they rested their contention of inconsistency was misunderstood, and that they did not intend to assert that a fraud count could not be laid against two or more persons under section 17 of the Oleomargarine Act without "being accompanied by averment of conspiracy." Thus the contention of inconsistency is reducible to a question of fact, whether in this particular instance the absence of a conspiracy rendered it impossible for defendants to commit the frauds charged in the second indictment. In its last analysis this question at once challenges the wisdom of the statutes and the power to enact them, since they punish a conspiracy to do an act independently of penalizing the act itself. The power to enact such legislation cannot be questioned (Clune v. United States, 159 U. S. 590, 595, 16 Sup. Ct. 125, 40 L. Ed. 269), and if the assertion of an impossibility of two or more persons to do a particular thing without first agreeing to do it could prevail, the law might readily be frustrated.

The true test of this question is to be found in the instant case, not only in the verdicts, but also in the very rule counsel rely on; for it must be remembered that the gist of the offense charged in the first indictment was the formation of a conspiracy in violation of section 37 of the Criminal Code (35 Stat. 1095), while the substantive frauds charged in the second indictment were direct violations of the Oleomargarine Act. 24 Stat. 209, and as amended in 32 Stat. 194, c. 784, § 8. It therefore needs only to be stated, in view of the decisions before cited, as well as the rule of Mr. Bishop, that the evidence offered to prove the fraud counts of the second indictment was not of a character, certainly was not sufficient, to prove the conspiracy alleged in the first indictment. These distinct offenses can-

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not be confused by the relation of evidence offered to show execution of the conspiracy alleged (not the conspiracy itself) to the evidence offered to show actual commission of the frauds charged in the other indictment. The contention of fatal inconsistency must therefore fail.[1]

We are the more content with this conclusion because of the consideration this court gave to a closely analogous question in Swepston v. United States, 251 Fed. 205, 209, 210, 163 C. C. A. 361, 365. Two cases had been brought and tried together before the District Judge upon petitions to attach for contempt. It was in substance charged in the petitions that respondents, sheriff and jailer, had conspired with one Dye, a prisoner, and had permitted and assisted him to escape from jail. In their answers the respondents denied both the alleged conspiracy and acts of permitting and assisting the prisoner to escape. It was found that the conspiracy alleged was not proved, but that the respondents in fact permitted and assisted the prisoner to escape, and judgment was rendered accordingly, and upon error the judgment was affirmed. In the course of the opinion it was said:

"True, the conspiracy alleged was not proved; though, as already stated, Judge Sater found both respondents guilty of 'permitting and assisting Dye to escape.' This finding was clearly permissible, regardless of the charge of conspiracy; the fact of permitting and assisting might well have existed, and under the evidence apparently did exist, apart from the alleged conspiracy."

[4] We have thus far assumed the legal sufficiency of indictment 800. It is claimed that defendants are not charged with having been engaged in the business of manufacturing oleomargarine within the meaning of section 17 of the act. The variations in averment, already pointed out, as to the capacities in which defendants acted had the effect in some of the counts—third, fourth, seventh, and eighth—of charging them individually as principals and in the language of the statute as manufacturers of oleomargarine. This was sufficient, certainly on the face of the counts (Hardesty v. United States, 168 Fed. 25, 26, 29, 93 C. C. A. 417 [C. C. A. 6]); and so with the second count, since defendants were also charged there individually as principals though as operating under the name of the company (United States v. Orr [D. C.] 233 Fed. 718, 720). Counsel's claim must there-

[1] It may be added that both conspiracy and fraud counts were set up in the indictment in United States v. Morse (C. C.) 161 Fed. 429, 431, which survived demurrer, except as to some of the fraud counts. The defendants were acquitted under the former and convicted under the latter and the judgment was affirmed. Morse v. United States, 174 Fed. 539, 555, 98 C. C. A. 321, 20 Ann. Cas. 938 (C. C. A. 2). Petition for writ of certiorari was denied. 215 U. S. 605, 30 Sup. Ct. 406, 54 L. Ed. 346. It is claimed for the government, and denied for lack of knowledge by opposing counsel, that the question urged here was presented in the petition for writ of certiorari. We are not disposed, and in view of the decisions we have pointed out it is not necessary, to rest this feature of the case upon the fact that the same question seems to have arisen though does not appear to have been passed on in the Morse Case. It may be observed moreover that the practice of introducing a conspiracy count into indictments of kindred character was criticised in Hart v. United States, 240 Fed. 911, 915, 153 C. C. A. 597 (C. C. A. 2), but it was, of course, recognized as a lawful practice.

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fore come to this: That the remaining counts do not charge that defendants committed any act at all, except as representatives of the corporation, and that they could not have been individually engaged as principals in the business of manufacturing oleomargarine, or have committed any fraud, within the meaning of the statute; indeed, counsel rely on the decision in United States v. Orr (D. C.) 223 Fed. 222, 224, which was rendered prior to the decision in the case of that name before cited and seemingly part of the same case.

The difference between the Orr Cases, as the decision in the second one indicates (233 Fed. at page 720), is that the defendants in the first were charged in their several capacities as officers of a named corporation, while in the second they were charged individually as principals, but as carrying on the business in the name of the corporation. The counts passed on in those cases are not sufficiently disclosed safely to compare them with the present counts as respects the reason for reaching opposite conclusions in the cases. We cannot think the difference there pointed out is material in the instant case. All the counts alike are here aimed against the very same persons; each count opening with a direct charge against them individually and employing practically the same language to characterize their acts, except only that in the first, fifth, sixth and ninth counts defendants are alleged to have committed the acts "while engaged as officers, agents and employés" of the corporation. Thus in the counts last mentioned defendants are severally charged in a double capacity, individual and representative, while in the others they are charged only as individuals. The effect of the averment touching the dual character of defendants was to set out a violation of the oleomargarine act through defendants' intentional perversion of the Dairy Company's corporate powers. And it is a rule of the criminal law as well as the civil that corporate agencies cannot shield themselves behind the corporation, where they are the actual and efficient actors in committing a fraud or an offense. United States v. Winslow (D. C.) 195 Fed. 578, 581, by the late Circuit Judge Putnam; Wood v. United States, 204 Fed. 55, 57, 122 C. C. A. 369 (C. C. A. 4); United States v. MacAndrews & Forbes Co. (C. C.) 149 Fed. 823, 832, by Judge Hough; Crall & Ostrander's Case, 103 Va. 855, 859, 49 S. E. 638; Bank v. Trebein, 59 Ohio St. 316, syl. 1, 52 N. E. 834; Exploration Mercantile Co. v. Pacific H. & S. Co. (D. C.) 177 Fed. 825, approved at page 839, 101 C. C. A. 39 (C. C. A. 9). The principle intended to be applied finds expression in the language of Chief Justice Campbell who, in Hempfling v. Burr, 59 Mich. 294, 26 N. W. 496, had occasion to say of a bank cashier who sought to escape a charge of fraud on the theory that it had been committed in his official capacity (59 Mich. 295, 296, 26 N. W. 496):

"In such a case it is quite likely that Burr's conduct may have been official, but we are not aware of any principle which will exempt a person from personal responsibility for fraud committed in a double capacity."

[5] Further, considering the nature of the offenses here complained of, the acts charged against defendants in their dual capacities were such as would bind the corporation. New York Central R. R. v.

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United States, 212 U. S. 481, 492, 495, 29 Sup. Ct. 304, 53 L. Ed. 613. If the corporation had been included with the present defendants in the indictment, as it clearly might have been under appropriate allegations (New York Central R. R. v. United States, supra), the legal sufficiency of the indictment would not in the present state of the law have been open to serious dispute, although defendants might in a technical sense have been regarded as aiders and abettors. Such is the necessary and adjudged effect of section 332 of the Penal Code:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." 35 Stat. pt. 1, p. 1152 (Comp. St. § 10506).

See Wood v. United States, 204 Fed. 55, 58, 122 C. C. A. 369 (C. C. A. 4); Dean v. United States, 246 Fed. 568, 574, 158 C. C. A. 538 (C. C. A. 5); Rooney v. United States, 203 Fed. 928, 931, 932, 122 C. C. A. 230 (C. C. A. 9); and see Ruthenberg v. United States, 245 U. S. 480, 483, 38 Sup. Ct. 168, 62 L. Ed. 414.

And where the statute, as here, has abrogated the distinction prevailing at the common law between principals and accessories in the commission of felonies, a charge against one formerly known as an accessory is good against him as principal. Rosencranz v. United States, 155 Fed. 38, 43, 83 C. C. A. 634 (C. C. A. 9). So, where persons were formerly chargeable as aiders and abettors, they may be indicted and prosecuted as principals, whether the principal offender has been indicted and acquitted (Rooney v. United States, supra), or has not been indicted at all (Wood v. United States, 204 Fed. supra, at page 58, 122 C. C. A. 369). This results, too, from the rule prevailing in some jurisdictions that under such modifying statutes the act of aiding and abetting is a substantive offense. Goins v. State, 46 Ohio St. 457, 462, 21 N. E. 476.[2]

It must follow from the foregoing considerations that the first, fifth, sixth, and ninth counts, as well as the others before passed upon, of indictment 800, are legally sufficient.

[6] 2. *Consolidation of the Two Indictments, One for Conspiracy and the Other for Substantive Fraud, Permissible.*—It is insisted that defendants were deprived of a fair trial by the order of consolidation. It is settled that section 1024, Rev. St. (Comp. St. § 1690), invests trial judges with discretionary power to require indictments charging one or more persons with different though connected acts or transactions of the same class of crimes or offenses to be consolidated for purposes of trial; this, of course, signifies a judicial discretion,

[2] Well-known rules and distinctions of the common law, which would otherwise be applicable here, have been modified by both federal and state legislation; and the state statutes, in connection with pertinent principles of the common law, have been frequently and exhaustively discussed by the courts of last resort in quite a number of the states. We may refer to the following: People v. Bliven, 112 N. Y. 79, 82, 19 N. E. 638, 8 Am. St. Rep. 701, et seq., by Judge (later Mr. Justice) Peckham; Vogel v. State, 138 Wis. 315, 330, 119 N. W. 190, et seq.; Spies v. People, 122 Ill. at page 242, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, et seq.; People v. Outeveras, 48 Cal. 19, 21 to 26. And see Rosencranz v. United States, supra.

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soundly exercised, and not the uniting of offenses which for that reason would confound and prejudice the defendants. Dolan v. United States, 133 Fed. 444, 446, 69 C. C. A. 274 (C. C. A. 8). Similar power exists independently of the statute. Logan v. United States, 144 U. S. 263, 296, 12 Sup. Ct. 617, 36 L. Ed. 429; Brown v. United States, 143 Fed. 60, 66, 67, 74 C. C. A. 214 (C. C. A. 8). The nature of the power, however, implies that it may be improvidently exercised, though, in view of Mr. Justice Gray's observation in Mutual Life Insurance Co. v. Hillmon, 145 U. S. at page 293, 12 Sup. Ct. 909, 36 L. Ed. 706, such instances must be exceedingly rare. This is not to be qualified by the ruling in McElroy v. United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355, in view of differences in the indictments there pointed out (164 U. S. at page 79, 17 Sup. Ct. 31, 41 L. Ed. 355) and ruled upon (164 U. S. at page 81, 17 Sup. Ct. 31, 41 L. Ed. 355); and the features distinguishing that decision from the general rule received further attention in Williams v. United States, 168 U. S. 382, 390, 18 Sup. Ct. 92, 42 L. Ed. 509.

We have seen that the defendants in the instant case were included in both indictments, the one for alleged conspiracy and the other for fraud, and that the conspiracy alleged was to defraud the government of taxes like those of which it is alleged in the second indictment the government was actually defrauded. While distinct offenses were thus charged as before shown, it is evident that the indictments involved transactions of the same character, "transactions connected together," and "of the same class of crimes or offenses" within the meaning of section 1024 (Williams v. United States, supra, 168 U. S. at pages 390, 391, 18 Sup. Ct. 92, 42 L. Ed. 509); and in Emanuel v. United States, 196 Fed. 317, 320, 116 C. C. A. 137 (C. C. A. 2) it was held that where several defendants were included in each of several indictments, one charging conspiracy to commit substantive offenses and the others charging their actual commission, the indictments were rightly consolidated. True, upon the hearing of the instant motion to consolidate, counsel for the government expressed the belief in substance that no confusion would arise under the evidence offered in support of the respective indictments, certainly none that could not be cleared up by the court's instructions to the jury. The court expressed some misgiving, and in granting the order charged the government with the risk. On the motion for new trial, however, the trial judge believed that defendants had suffered no prejudice from the order, and in view of the record and of his presence at the trial it cannot be said that the order was not justified. Morse v. United States, 174 Fed. 539, 541, 98 C. C. A. 321 (C. C. A. 2), and petition for writ of certiorari denied, 215 U. S. 605, 30 Sup. Ct. 406, 54 L. Ed. 346; Gardes v. United States, 87 Fed. 172, 176, 30 C. C. A. 596 (C. C. A. 5); Lemon v. United States, 164 Fed. 953, 958, 90 C. C. A. 617 (C. C. A. 8).

3. *Rulings in Course of Trial.*—The assignments of error include rulings of the court (a) claimed to be inconsistent respecting admission of testimony and purposes for which the jury might consider it, whereby defendants "were kept in ignorance of what evidence had

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been admitted" against them respectively "and for what purpose"; (b) refusing before the government closed its case to pass on exhibits and testimony offered as to certain of the defendants and compelling them to proceed with their defense before announcing whether and for what purpose such evidence was admitted; and (c) admitting claimed improper evidence offered by the government, refusing to strike out claimed inadmissible and prejudicial evidence, and withdrawing admissible evidence introduced by defendants. The details of these assignments are made the subjects of elaborate arguments. It is not feasible, nor is it necessary, to pass on the matters separately, or to group them so as to show the reasons for all the rulings complained of, though they have all been considered.

We understand counsel's claim in respect of inconsistent rulings to mean, for instance, that evidence would be received either generally or conditionally, or for special purposes, and subsequently either changed in scope or ruled out, and that many of such rulings were unduly delayed. It is true that rulings of this character were made in a number of instances. Some took place before and some after all the evidence was closed, and others after the opening arguments to the jury had been concluded; but we do not see how defendants, through their counsel, could have failed to observe and follow either the evidence that was finally retained or the purposes to which it was to be applied. It might as well be said that evidence received without objection or withdrawal could not be remembered or otherwise made available for purposes of defense. So far as any discoverable effect of the course pursued in the instant case is concerned, the ultimate rulings made on questions of evidence must be the test of error; and it is quite as vain to assign error to the intermediate rulings as it is to expect that changes in rulings will not occur in the course of a long trial, involving many and complicated items of evidence. It is said, however, that the effect of reserving rulings here until after the government closed its case, and requiring defendants meanwhile to proceed with their defense, was to violate article 5 of the Amendments to the Federal Constitution, which article in substance forbids compelling a person in a criminal case to be a witness against himself or depriving him of the guaranty of due process of law. We are not impressed by this contention. It did not deprive defendants of opportunity through care of their own and their counsel to observe and separate the subjects of such deferred rulings from the rest of their defense. Moreover, as to the rulings made after the testimony for the defense was closed and before the arguments were begun, defendants' introduction of testimony on the subjects of such rulings was voluntary, and cannot be said to have been prejudicial for that reason. It was open to defendants to withhold their testimony in that behalf until the reserved questions were passed upon; and as to the rulings made at the close of the opening arguments we do not discover that any objection was made to proceeding with the arguments, though error is assigned touching this feature of the delayed rulings. Nor is it perceived how defendants were prejudiced by any of such reserved rulings, for these rulings came at times when their entire

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effect could be more readily apprehended and applied by both counsel and jury.

[7] We may add that our consideration of the rulings in question convinces us that the trial judge studiously analyzed the subjects involved and carefully instructed and warned the jury as to the purposes for which the evidence was received. The endeavor was, as the judge states in one of his rulings on a question of evidence, "to withhold final ruling until the case was so developed" that he "understood it." The necessity and wisdom of such a course in a case like this must be apparent to every experienced lawyer. In a word, we think the efforts made to render the evidence intelligible to the jury met the requirements intended to be exacted by this court in the Hendrey Case, 233 Fed. at pages 17, 18, 147 C. C. A. 75, here relied on by the defendants. And it is not to be assumed in a criminal case, any more than in a civil case, that a jury cannot grasp the meaning of a court's instructions touching admissibility and purposes of evidence, even though a change in ruling in that behalf be involved. As Mr. Justice Harlan said in Pennsylvania Co. v. Roy, 102 U. S. 451, 459 (26 L. Ed. 141), when speaking of an error committed by a trial judge which he subsequently corrected through instructions given to the jury:

"The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

There are exceptional instances, of course, where improper testimony may be received and subsequently excluded or withdrawn without removing the effect produced by its admission (Hopt v. Utah, 120 U. S. 430, 438, 7 Sup. Ct. 614, 30 L. Ed. 708; Looker v. United States, 240 Fed. 932, 153 C. C. A. 618 [C. C. A. 2]); but as respects the claimed inconsistent rulings as also certain withdrawals complained of here we are not convinced that any such instance is shown.

Upon the contention that the government was permitted to offer improper evidence, and that the court refused to strike out inadmissible and prejudicial evidence and directed withdrawal of admissible evidence introduced by defendants, we need not dwell. It would serve no useful purpose to point out the items of evidence discussed by counsel in this contention. Our examination of these features of the case and of the arguments of learned counsel concerning them persuades us that the objections may safely be answered in the language of the court when passing upon a kindred situation in the Morse Case, supra (174 Fed. at pages 554, 555, 98 C. C. A. 321, 336 [C. C. A. 2]):

"In an unusually protracted trial, depending upon a wilderness of figures, and during which a vast number of complicated transactions were investigated, it is not unnatural that mistakes should have been made. Neither is it sur-

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prising that judges removed from the excitement of the forum, who have time to examine the events of the trial as they appear when portrayed in cold type, should have discovered some rulings which may be open to criticism. But we are convinced that no prejudicial error was committed."

4. *General Charge and Defendants' Special Requests.*—Considering the general charge (as to indictment 800) in its entirety, we think it was as favorable to the defendants as the law justified. It is in all respects fair and is comprehensive; it bears the impress of careful study in connection with numerous reported decisions pointed out; it in substance covers each of the special requests made in behalf of defendants so far as such requests were in accord with our conception of the weight of authority. The complaints made of the general charge and of the refusals to grant special charges consist of verbal criticism, and challenge of matters lacking in prejudicial effect, rather than anything amounting to reversible error. This may be illustrated by counsel's criticism upon the language used in the general charge to define reasonable doubt. The language and the citations accompanying it show that this portion of the charge, while not identical with, is to all intents and purposes the same as, language employed for a like object in well-known cases of this circuit, by Circuit Judge (later Mr. Justice) Jackson in the Harper Case (C. C.) 33 Fed. 482 to 484, Judge Hammond in the Means Case (C. C.) 42 Fed. 606, 607, and Judge Taft in the Youtsey Case (C. C.) 91 Fed. 868, 869; and in further support reference was made to Griggs v. United States, 158 Fed. 572, 578, 85 C. C. A. 596, and citations (C. C. A. 9).

Again it is urged that the court erred in refusing specifically to instruct the jury that under the evidence Snevily, for example, was an accomplice, instead of leaving the fact to be found by the jury; also in failing properly to define what corroboration meant respecting his testimony, and also in confusing the jury with two different rules by which to measure such testimony. But the trial judge referred to and evidently followed rules laid down by Mr. Justice Day in Holmgren v. United States, 217 U. S. 523, 524, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778, and by Judges Caldwell, Sanborn, and Thayer in Re Rowe, 77 Fed. 165, 166, 23 C. C. A. 103; and these decisions, as also the one in the Caminetti Case, since rendered (242 U. S. 495, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168), leave no room even for verbal criticism upon these features of the charge. We cannot think it necessary further to pursue the subject of the court's instructions.

[8] 5. *The Evidence.*—Motion to direct acquittal of each defendant was denied, as before pointed out. It is claimed that the evidence was not sufficient to show the commission of any of the frauds charged, nor to support the verdict against any of the defendants. It was for the jury to pass upon the facts; and it is for this court to determine whether there was evidence introduced which was proper to go to the jury and legally sufficient to sustain the verdicts.[3] It is not open

[3] Crumpton v. United States, 138 U. S. 361, 362, 11 Sup. Ct. 355, 34 L. Ed. 958; France v. United States, 164 U. S. 676, 681, 17 Sup. Ct. 219, 41 L. Ed. 595; Humes v. United States, 170 U. S. 210, 212, 213, 18 Sup. Ct. 602, 42 L. Ed.

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to serious dispute that proper evidence was introduced to show that substantial portions of the oleomargarine product described in the fraud counts was artificially colored and removed at or about the times alleged and without payment of the prescribed tax; and, irrespective of the evidence restricted by the trial judge to the conspiracy count, we are satisfied from the record that proper evidence was ultimately received under the fraud counts in relation to the respective defendants which, if believed, was sufficient in law to support the several verdicts. This conclusion is strengthened by the fact that the trial judge, who had every opportunity to see and hear the witnesses and to become familiar with the circumstances disclosed at the trial, refused motions for new trial based in part upon the ground of insufficiency of evidence.

[9] 6. *Continuance Denied.*—Error is assigned to the refusal of the trial court to grant a motion supported by affidavits to continue the trial of the cause to the next succeeding term. This assignment has been earnestly supported both by brief and oral argument. The main ground of the motions was that immediately before the time fixed for trial of the cause many newspaper publications, purporting to relate in part to the facts involved in this cause and in part to the facts involved in other similar prosecutions, were circulated in the counties from which the jurors were to be drawn, and hence that defendants could not obtain a fair trial of the cause at the time fixed for the hearing. No sufficient showing is made that the opposing party, the government, instigated or brought about these publications. The question presented was after all one of judicial discretion and not subject to review, except where it is clearly shown that the discretion has been abused. Hardy v. United States, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1137; Isaacs v. United States, 159 U. S. 487, 489, 16 Sup. Ct. 51, 40 L. Ed. 229; Holt v. United States, 218 U. S. 245, 248, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138. The trial judge and the counsel alike exercised a marked degree of care and caution in securing fair and unbiased jurors and the court in its general charge specially admonished and instructed the jury not to consider these publications; it therefore cannot rightfully be said either that the court abused its discretion or that defendants suffered prejudice through denial of the motion.

Judgment affirmed.

1011; Burton v. United States, supra, 202 U. S. 373, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Ling Su Fan v. United States, 218 U. S. 302, 308, 31 Sup. Ct. 21, 54 L. Ed. 1049, 30 L. R. A. (N. S.) 1176; Looker v. United States, supra, 240 Fed. 933, 153 C. C. A. 618 (C. C. A. 2); Tapack v. United States, 220 Fed. 445, 448, 137 C. C. A. 39 (C. C. A. 3); Hart v. United States, 84 Fed. 799, 803, 804, 28 C. C. A. 612 (C. C. A. 3); Dean v. United States, 246 Fed. 568, 572, 158 C. C. A. 538 (C. C. A. 5); Kellogg v. United States, 103 Fed. 200, 201, 43 C. C. A. 179 (C. C. A. 6); Hays v. United States, 231 Fed. 106, 108, 145 C. C. A. 294 (C. C. A. 8); Elder v. United States, 243 Fed. 84, 89, 155 C. C. A. 614 (C. C. A. 9); People v. Henssler, 48 Mich. 49, 51, 11 N. W. 804.

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(258 Fed. 408)

IRON MOLDERS' UNION, LOCAL NO. 68, et al. v. NILES-BEMENT-POND CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1918.)

No. 3146.

1. COURTS ⟸317—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—ALIGNMENT OF PARTIES.
In determining jurisdiction of a federal court, parties must be aligned as plaintiffs or defendants, respectively, according to their mutual interests.

2. COURTS ⟸317—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—ALIGNMENT OF PARTIES.
In a suit by a corporation against a subsidiary corporation, of which complainant has complete control through stock ownership and common officers, and numerous ex-employés of defendant company and local labor unions, to enjoin acts of the latter named defendants growing out of a strike, and in which no relief is asked against the corporation defendant, such defendant must be aligned with complainant, and, if it is an indispensable party, the fact that it is a citizen of the same state as its codefendants will defeat the jurisdiction of a federal court.

3. INJUNCTION ⟸114(3)—INDISPENSABLE PARTIES.
To a suit by a corporation against another corporation and its striking employés, to enjoin the latter from interfering with its business and present employés, the defendant corporation is an indispensable party; its rights as against those of its codefendants being necessarily involved.

Appeal from the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by the Niles-Bement-Pond Company against the Niles Tool Works Company, the Iron Molders' Union, Local No. 68, and others. From an order granting a preliminary injunction, certain of the defendants appeal. Reversed.

For opinion below, see 246 Fed. 851.

W. B. Rubin, of Milwaukee, Wis., and R. J. Shank, of Hamilton, Ohio, for appellants.

Murray Seasongood, of Cincinnati, Ohio, and Allen Andrews, of Hamilton, Ohio, for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

PER CURIAM. [1] This case presents a question of jurisdiction of the District Court, dependent entirely upon diversity of citizenship. The bill was filed by appellee Niles-Bement-Pond Company, a New Jersey corporation, as sole plaintiff, against the Niles Tool Works Company, an Ohio corporation, doing business at Hamilton, Ohio (hereinafter called the defendant company or the Tool Works), together with a large number of individual defendants (including two unincorporated Iron Molders' Union locals, located at Hamilton); the others being officers, representatives, or members of the respective unions or persons acting in sympathy therewith. The individual de-

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fendants are all residents of Ohio. If the defendant company is properly aligned with the individual defendants, jurisdiction exists. If, however, it should be aligned as a coplaintiff, jurisdiction fails; for, in determining jurisdiction, the parties must be aligned, as plaintiffs or defendants, respectively, according to their mutual interests. Dawson v. Columbia Trust Co., 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713; Hamer v. N. Y. Railways Co., 244 U. S. 266, 274, 37 Sup. Ct. 511, 61 L. Ed. 1125.

[2] This suit is an outgrowth of a strike by former employés of the Tool Works (the defendant company) who are members of one of the Molders' Union locals. Its object is to restrain defendants other than the Tool Works from acts of intimidation, threats, abuse, and violence directed toward the Tool Works' employés and their families, as well as the congregating by individual defendants, and those acting in concert or sympathy with them, at or about the Tool Works factory and plant, as well as at the homes of that company's workmen. The District Court granted a preliminary injunction. 246 Fed. 851. This appeal is from that action.

Plaintiff's interest in and relations to the strike, and the grounds on which its claim to relief is based, are these: It has contracts for machinery and munitions to be furnished the government of the United States, amounting in value to about $3,000,000, the greater part thereof being for work necessary for the prosecution of the present war; its contracts therefor being either directly with the government or with concerns which have such contracts therewith, priority for such work being given by the National Defense Act (Act June 3, 1916, c. 134, 39 Stat. 166). Plaintiff has placed orders for a large amount of this work with the defendant company and cannot well have it performed elsewhere; the work so contracted for being nearly all partially manufactured and constructed, and being of such kinds and sizes that it cannot profitably be removed from the Tool Works' plant or completed elsewhere. Indeed, industrial plants generally which are equipped for manufacturing this class of machinery have prior orders in such amount as to forbid taking on the orders in question. Plaintiff is also prevented by the strike from taking further profitable contracts for similar work offered by the governments allied with the United States, as well as by other contractors. The strike will occasion plaintiff heavy loss of profits, besides subjecting it to danger of forfeiture of contracts and large damages. But for the threatened violence on the part of strikers and sympathizers, the defendant company could perform the contracts with plaintiff.

It is clear that plaintiff has a right to complain of unlawful injuries to its rights, but it seems equally clear that the defendant company, if it is to be a party, is interested on the same side of the suit with plaintiff, and that as between these two parties there is no adverse interest. The plaintiff absolutely controls the defendant company, through plaintiff's ownership of the entire common stock and a majority of the preferred stock of that company—the two corporations having a common president, one vice president in common, a majority of the board of directors of the defendant company be-

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ing also directors of the plaintiff company. Each company, however, has a separate manager. The defendant company is essentially a subsidiary of the plaintiff. Ninety-five per cent. of the work done by the defendant company is allotted to it by the plaintiff. From the gross price under plaintiff's contracts with the government and others so allotted to defendant company, plaintiff receives a commission of 10 per cent. The defendant company receives the balance. The president of the two companies is authorized to fix the prices under its contracts with the government and others, and thus in effect the prices which the defendant company shall receive. Naturally and normally, the two corporations would stand together in every way, so far as their interests in this suit are concerned. That they do so stand together is affirmatively shown. The defendant company employed and paid the guards and watchman, and the representatives of the two companies consulted together regarding the strike, "how to manage it and how to get men into the foundry." The defendant company seems not to have appeared of record in the suit; its works manager testified that he "should say" that the counsel present at the trial [employed by plaintiff] represented both plaintiff and defendant company (presumably in reference to the conduct of the strike), that the witness had consulted with the attorneys named "in regard to matters connected with this strike," and that one of them represented the defendant company when one of the strikers was arrested, apparently during the strike now in question.

The bill states no case for relief against the defendant company and no such relief is asked, unless by the general prayer that the "court grant plaintiff any and all other equitable relief which in equity and good conscience it is entitled to receive." Indeed, plaintiff's control of the defendant company, and the complete harmony between them, renders relief at the hands of the court as against defendant company entirely unnecessary. It is equally clear that the interests of the defendant company and those of the individual defendants are wholly adverse to each other.

[3] The pivotal question thus is whether the defendant company has such a real interest in the subject-matter of the litigation as to render its presence necessary to make the final decree effectual. If so, it is an indispensable party. Hamer v. N. Y. Railways Co., 244 U. S. 266, 274, 37 Sup. Ct. 511, 61 L. Ed. 1125, and cases there cited; Steele v. Culver, 211 U. S. 26, 29, 29 Sup. Ct. 9, 53 L. Ed. 74; Lindauer v. Compania Palomas, etc. (C. C. A. 8) 247 Fed. 428, 432, 159 C. C. A. 482; South Penn Oil Co. v. Miller (C. C. A. 4) 175 Fed. at page 737, 99 C. C. A. 305; Waterman v. Canal-Louisiana Bank, 215 U. S. 33, 49, 30 Sup. Ct. 10, 54 L. Ed. 80; Gen. Investment Co. v. Railroad Co. (C. C. A. 6) 250 Fed. 160, 170, 162 C. C. A. 296.

We think this question must be answered in the affirmative. Treating the defendant company as an independent corporation as fully as plaintiff claims it to be, its interest in the settlement of the controversy between itself and its employés is direct and immediate, while that of the plaintiff is indirect and derivative. The court could

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not decide in favor of the individual defendants without deciding against the asserted rights of the defendant company. Such adverse decision might well be disastrous to that company, and could not be made in its absence. On the other hand, a determination in favor of plaintiff would necessarily involve a determination in favor of the defendant company as against its employés, in respect of which the defendant company is vitally and immediately interested, and on which the court would require it to be heard. Moreover, the individual defendants have the right to have those issues settled as between themselves and defendant company. Jenney v. Hayden (C. C.) 171 Fed. 898, 899. Again, while the suit cannot be said to be collusive within the rule in Miller & Lux v. East Side Canal Co., 211 U. S. 293, 29 Sup. Ct. 111, 53 L. Ed. 189, and kindred cases, and not collusive in any vicious sense, yet, however much plaintiff may have been justified in preferring the federal court, it is apparent that the making of the Tool Works a defendant, instead of a coplaintiff, was "merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." Dawson v. Columbia Trust Co., 197 U. S. 178, 181, 25 Sup. Ct. 420, 422, 49 L. Ed. 713; Hamer v. Railways Co., supra, 244 U. S. at page 274, 37 Sup. Ct. 511, 61 L. Ed. 1125. The very omission of any real prayer for relief against the defendant company "shows that properly it is to be treated as a plaintiff." Steele v. Culver, supra, 211 U. S. at page 29, 29 Sup. Ct. 9, 53 L. Ed. 74. And see Dawson v. Trust Co., supra, 197 U. S. at page 180, 25 Sup. Ct. 420, 49 L. Ed. 7.

We scarcely need say that we see no merit in the suggestion that the joinder of the defendant company as coplaintiff would make the bill multifarious. The case is not like Helm v. Zarecor, 222 U. S. 32, 36, 32 Sup. Ct. 10, 56 L. Ed. 77, where the party whose alignment was in question took sides with neither of the real parties to the controversy, but was merely the holder of the title, which might go to one or the other of the real parties. Nor is it governed by the rule announced in Metropolitan Railway Receivership Case, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403, where jurisdiction over a proper receivership, in a case of actual diversity of citizenship, was not allowed to be defeated merely because both parties preferred the federal court and united in having the proceeding in that court. Nor is it within the rule pertaining to a suit by a stockholder on behalf of a corporation (such as Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606), where the latter refuses to act.

Plaintiff, however, bases here its claim to jurisdiction, as it did below, on Carroll v. Chesapeake & Ohio Coal Agency Co. (C. C. A. 4) 124 Fed. 305, 61 C. C. A. 49. In that case, which was an appeal from a refusal to dissolve an injunction, the plaintiff corporation, engaged in the business of selling coal and coke, had contracts with defendant coal companies by which it was to take and pay for their product at the mines, to furnish transportation, and sell at prices fixed by the companies, receiving a stipulated sum per ton for its services. By the terms of the contracts the defendant companies were not liable for damages for failing to furnish coal or coke to plaintiff where such

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failure was caused by strikes. In reliance on such contracts, plaintiff had contracted for the sale of large quantities of coal and coke, which could only be supplied by the mines of the defendant companies, and which the latter were prevented from furnishing by the acts of the individual defendants, who were conducting a strike among the miners, and who by intimidation and threats prevented others from working in the mines. It was held that the bill showed an interest in plaintiff so different from that of the coal companies as to entitle the plaintiff to maintain the suit in its own right, independently of those companies, and that the latter could not be aligned with plaintiff to defeat jurisdiction.

Assuming that the Carroll Case was properly decided, yet the differences between that case and this are radical. There the plaintiff could not control the coal companies; the latter were alleged to be irresponsible, and injunction was asked to restrain them from allowing the individual defendants or others to do acts tending to interfere with the working of the coal companies' employés. The court's opinion commented upon this prayer. Here, as already said, there is no such prayer, and no suggestion of insolvency; and plaintiff can absolutely control the action of the defendant company. There the plaintiff was, at the most, the sales agent of the coal companies; here the relations were quite different. Plaintiff's contracts with the government and others are made parts of its contracts with the defendant company, which, if the contracts are not fulfilled, must suffer in direct correspondence with plaintiff. There a distinction was drawn between the injuries suffered by the plaintiff and the companies, respectively, in that the former, by its failure to obtain coal and coke, would not only incur heavy and immediate pecuniary loss but suffer utter destruction of its business; while the latter would suffer merely an interruption in the profits, which, as they still had the mines, they could recoup when work was resumed. Indeed, if the prices of coal had increased, it was to the interest of the coal companies to escape from their contracts, without liability, through the medium of the strike. Here the differences between the injuries to plaintiff and the defendant company, respectively, are largely, if not entirely, of degree. Here there is no claim of fault on the part of the defendant company; there, in commenting on the alleged misjoinder of the coal companies as defendants, the court distinctly recognized the possibility of actual fault on their part, saying:

"It is the duty of the coal companies to have the mines worked; that of the individual defendants not to obstruct this operation. Discharging their duty, the coal companies should exhaust effort in obtaining workers for their mines, and in restraining and preventing the obstruction of the work. Non constat that the action of the individual defendants may not have been taken because of some acts of omission or commission on the part of the coal companies. At least complainant has the right to know about this, and the coal companies have the right to disavow and disprove it. Until this is done, the fault may lie with the coal companies and the individual defendants, with either or both."

We cannot accept the Carroll Case as an authority for jurisdiction here. The instant case is such as to make its failure for lack of juris-

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diction unfortunate; but the conclusion that jurisdiction was lacking seems inevitable.

It results that the order complained of must be reversed, and the record remanded, with directions to dismiss the bill.

(258 Fed. 413)

WEST v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1919.)

No. 3210.

1. PERJURY ⟸29(4)—VARIANCE.
An indictment for perjury under Comp. St. § 1687, which averred that the oath was taken by accused "before" a District Judge named, *held* supported by proof that the oath was taken in open court presided over by such judge, and was administered by the deputy clerk of the court.

2. CRIMINAL LAW ⟸1186(4)—REVERSAL—TECHNICAL ERROR—VARIANCE.
Assuming that an indictment for perjury must be construed as averring that the oath was administered by the judge, whereas the proof was that it was administered by the deputy clerk in open court, the variance, where not prejudicial to defendant, is not ground for reversal, under Judicial Code, § 269, as amended by Act Feb. 26, 1919, which requires the court on any writ of error to give judgment on the entire record, "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

3. PERJURY ⟸9(1)—JURISDICTION OF COURT.
False swearing by a witness on hearing of a motion for preliminary injunction in a federal court *held* to constitute perjury, where the bill alleged facts showing diversity of citizenship which gave the court jurisdiction, although the testimony developed an identity of interest, between complainant and one of defendants which required the latter's alignment with complainant and defeated jurisdiction.

4. CRIMINAL LAW ⟸365(3)—EVIDENCE—RES GESTÆ.
Where, in a trial for perjury, it became an issue of fact whether defendant assaulted and struck another during a strike, testimony that immediately after striking such person defendant followed up and struck his companion, who was associated with him in work, *held* admissible as part of the res gestæ.

5. CRIMINAL LAW ⟸1159(2)—REVIEW ON ERROR—SUFFICIENCY OF EVIDENCE.
Where there is substantial testimony supporting the verdict in a criminal case, it cannot be disturbed by an appellate court on the ground of insufficiency of evidence.

In Error to the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Criminal prosecution by the United States against William West. Judgment of conviction, and defendant brings error. Affirmed.

Robert J. Shank, of Hamilton, Ohio, for plaintiff in error.
James R. Clark, Asst. U. S. Atty., of Cincinnati, Ohio.

Before KNAPPEN and DENISON, Circuit Judges, and EVANS, District Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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KNAPPEN, Circuit Judge. On September 14, 1917, the Niles-Bement-Pond Company, which was interested in the Niles Tool Works Company, of Hamilton, Ohio, filed bill in equity in the District Court for the Southern District of Ohio, against an Iron Molders' Union local and a large number of other defendants, including plaintiff in error herein, asking injunction (amongst other things) against threatening, intimidating, interfering with, assaulting, and applying abusive language to the tool company's workmen and others wishing to work for it, and from congregating in the streets of Hamilton, Ohio; a strike, affecting the employés of the tool company, being then in progress. The tool company was made a defendant. On the hearing of the application for preliminary injunction, plaintiff in error testified in open court that on the 10th day of September, 1917, he talked with a workman named Wise in front of the house of one Bruning, in Hamilton, telling Wise to join the union, that "your brothers are in there; why don't you come over and be right, too," but denying that he said anything would happen to Wise if he did not do so, or that he struck Wise or any one else.

An order for injunction made by the District Court was reversed by this court, with direction to dismiss the bill for lack of diversity of citizenship, resulting from a necessary alignment of the tool company as coplaintiff with the Niles-Bement-Pond Company, due to their mutual interest in the injunction suit. Iron Molders' Union Local No. 68 et al. v. Niles-Bement-Pond Co. (No. 3146, decided by this court Nov. 6, 1918) 258 Fed. 408, 169 C. C. A. 424. Meanwhile, plaintiff in error was indicted in the court below for perjury in so testifying on the application for injunction. This writ is brought to review a conviction thereunder.

[1] 1. The testimony on the trial of the perjury charge showed that the oath taken by plaintiff in error on the hearing of the injunction application (over which Judge Sater presided) was actually administered in open court by the deputy clerk of that court. The indictment averred that the oath was taken *before*—

"his honor, John E. Sater, a legally appointed, qualified and acting United States Judge for the Southern District of Ohio, said court being a competent tribunal and said John E. Sater being a competent officer and person before whom such oath is authorized by the laws of the United States to be administered."

The statute (U. S. Comp. St. 1916, § 1687) provides that in an indictment for perjury:

"It shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, *and* before whom the oath was taken, averring such court or person to have competent authority to administer the same, * * * and without setting forth the commission or authority of the court or person before whom the perjury was committed."

The indictment was sufficient in form, and the deputy clerk had full authority to administer the oath in the court's presence. Comp. St. 1916, § 1337. It was not necessary to allege the name of the clerk who administered the oath or that of the judge who took it. United States v. Walsh (C. C.) 22 Fed. 644, 646; United States v.

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Howard (D. C.) 132 Fed. 325, 335, 341. The act of the clerk, in the presence of the court, was the act of the court. United States v. Howard, supra, 132 Fed. at page 341. Apparently the word "and," italicized above, means "or." United States v. Walsh, supra. If there is merit in the objection that the evidence of the administering of the oath was insufficient, it can only be because of a fatal variance between the indictment and the proof. There was no variance whatever, unless the indictment must be construed as alleging that Judge Sater personally administered the oath, as distinguished from being the judge, "before" whom the oath was taken or "before whom" it was "authorized * * * to be administered."

[2] It is not entirely clear that the indictment requires such construction. But, assuming that the intention was to charge that Judge Sater personally administered the oath, we think that, upon the record in this case, the variance was not fatal. Were there reason to believe that plaintiff in error was misled to his prejudice, in preparation for defense or otherwise, by an allegation, express or implied, however unnecessarily made, that Judge Sater personally administered the oath, the case would be different; but the record removes all reasonable possibility of misleading or surprise, for not only was there no suggestion of that nature on the trial, but the testimony that the clerk administered the oath was received without objection and was uncontroverted, and plaintiff in error expressly admitted, as a witness, that he gave on the hearing of the injunction application the precise testimony introduced by the government through the stenographer who took it. The frame of the indictment is such as to preclude all possibility of a second prosecution for the same offense.

Section 1691 of the Compiled Statutes provides that—

"No indictment * * * shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

And section 269 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. § 1246]), as amended February 26, 1919 (40 Stat. 1181, c. 48), declares that—

"On the hearing of any * * * writ of error * * * in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

While neither of these sections attempts to sanction a violation of substantial rights, or to disregard prejudice (Markham v. United States, 160 U. S. 319, 16 Sup. Ct. 288, 40 L. Ed. 441), yet an immaterial and nonprejudicial variance between allegation and proof is not cause for reversal. See Matthews v. United States, 161 U. S. 500, 16 Sup. Ct. 640, 40 L. Ed. 786, where a variance of one day in the date on which the testimony was alleged to have been given in open court trial was held immaterial; Hogue v. United States, 192 Fed. 918, 114 C. C. A. 11, where an obviously clerical mistake in

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using the name "clerk," instead of "court," was held not vital, the court failing "to find by such mistake that plaintiff in error was in any wise misled or prejudiced"; Daniels v. United States, 196 Fed. 459, 464, 465, 116 C. C. A. 233, where we held that evidence that bankrupt may have owed the payee $200 was not a material variance from the charge in the indictment that the debt owed did not exceed $50, the exact amount not being material; and see United States v. Howard, supra, where it was held (132 Fed. 334, 335) under what is now section 1691, supra, that leaving blank the day of the month on which the perjury was alleged to have been committed did not vitiate the indictment.

In our opinion, the objection of variance is without substance.

[3] 2. On the trial of the perjury charge below there were introduced the Niles-Bement-Pond Company's petition (or bill) for injunction; the motion to dismiss made by defendants other than the tool works, on the ground, among others, of lack of diversity of citizenship; the plea of abatement of the defendants other than the tool works, alleging lack of jurisdiction by reason of collusion between the Niles-Bement-Pond Company and the tool works to give such jurisdiction; and the order allowing the preliminary injunction from which the appeal was taken to this court. The motion to dismiss was denied before the hearing of the application for temporary injunction was taken up. The plea in abatement does not appear to have been formally passed upon.

Plaintiff in error contends that the record showed no jurisdiction in the court below over the hearing of the injunction application, that plaintiff in error thus could not have been guilty of perjury, and that his motion to dismiss should have been granted. The decision of this court, since the conviction below, directing the dismissal of the bill for lack of jurisdiction is invoked.

It is the well-established general rule that perjury cannot be predicated of a false oath in a proceeding before a court which had no jurisdiction to inquire into the matter which was the subject of that proceeding,[1] as, for example, where the proceeding in which the oath was taken was one wholly unauthorized by law (State v. Gates, 107 N. C. 832, 12 S. E. 319), or where it did not appear that there was pending any writ or entry forming the basis for the testimony (State v. Hanson, 39 Me. 337), or where the special tribunal before whom the testimony was taken was illegally appointed and without authority to act (Com. v. Hillenbrand, 96 Ky. 407, 29 S. W. 287), or where testimony was taken under a wrongly assumed authority to try a case on its merits rather than merely to take the examination of a party (Hamm v. Wickfine, 26 Ohio St. 81).

To this general rule there are a number of limitations, as, for example, where a court has jurisdiction of the subject-matter and of the parties, and the testimony given is material to the inquiry then before the court, false swearing is perjury, although the proceed-

[1] See note to Morford v. Oklahoma, 54 L. R. A. 513, on "Perjury as Affected by Invalidity of Proceeding in Which Testimony is Taken."

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ings may be so irregular or erroneous as to require reversal on appeal (State v. Walton, 53 Or. at page 567, 99 Pac. 431, 101 Pac. 389, 102 Pac. 173 and cases there cited); and perjury may be committed on a trial under an indictment which is afterwards held insufficient (State v. Rowell, 72 Vt. 28, 47 Atl. 111, 82 Am. St. Rep. 918); and there may be jurisdiction in the absence of proof of facts dehors the record, which would be defeated by the presence of such proof (State v. Ridley, 114 N. C. 827, 19 S. E. 149).

It follows that, although a court may not have jurisdiction to proceed to judgment, it may have jurisdiction to take cognizance of a case in the first instance and until the facts showing lack of jurisdiction appear; and testimony given on a record showing jurisdiction is none the less perjury because facts later appear defeating jurisdiction, as, for instance, in suits for divorce in which the residence of a party within the state is necessary to relief or, in some cases, even to the jurisdiction of the court, false swearing to a bill showing such residence or jurisdiction, or false testimony in a suit under such bill, is perjury although it turns out that the right to relief, or even jurisdiction, is defeated by the absence of the asserted residence (People v. McCaffrey, 75 Mich. 115, 42 N. W. 681; Stewart v. State, 22 Ohio St. 477; Markey v. State, 47 Fla. 38, 37 South. 53).

Decisions in cases where the court has jurisdiction over the parties and over the subject-matter are not necessarily in point; and the same is true of cases holding that lack of jurisdiction over the person has been waived. We must reckon with the fact that the jurisdiction of the District Court was entirely dependent upon diversity of citizenship, and that lack of jurisdiction was not the subject of waiver. Interior Construction Co. v. Gibney, 160 U. S. at page 219, 16 Sup. Ct. 272, 40 L. Ed. 401. For the purposes of this opinion, we assume that the case is the same as if the District Court had itself, at the conclusion of the testimony, dismissed the suit for lack of jurisdiction, instead of making the order for injunction. We shall also assume that, if the petition for injunction had conclusively shown upon its face a lack of diversity of citizenship, the alleged false testimony would not amount to perjury.

The situation, however, is this: The petition for injunction in terms alleged diversity of citizenship between the Niles-Bement-Pond Company and the tool works. It set out the plaintiff's interest in and relations to the strike and the grounds on which its claim to relief are based in substance as given in the paragraph relating thereto on page 2 and the early part of page 3 of our opinion in No. 3146, supra (258 Fed. 409, 169 C. C. A. 425). But of the many facts otherwise enumerated on page 3 of that opinion (258 Fed. 409, 410, 169 C. C. A. 425, 426), the only one appearing in the petition is this:

"The plaintiff has practically the exclusive sale of the output of said [tool] company, selling approximately 95 per cent. of the products manufactured by that company, and has a large ownership of the stock of the defendant company."

We think the petition, standing alone, was not subject to motion to dismiss for lack of diversity of citizenship. The Niles-Bement-

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Pond Company's right to the exclusive sale of the tool company's output, and the former's interest in the latter's performance of subsisting contracts, tended to show an independent right to file a bill for relief; and the mere fact of its large ownership of stock in the tool company did not necessarily make the latter company merely a subsidiary of the former, nor did it amount to an assertion that the latter is actually dominated and controlled by the former. C., M. & St. P. R. R. v. Minneapolis Ass'n, 247 U. S. at page 500, 38 Sup. Ct. 553, 62 L. Ed. 1229; Bigelow v. Calumet & Hecla Min. Co. (C. C. A. 6) 167 Fed. 721, 94 C. C. A. 13. True, the failure of the bill to ask relief against the tool company (unless by the clause in the prayer "that the plaintiff recover of the defendants its damages suffered"—the bill elsewhere characterizing the tool company as the "defendant company"), and (as we held in No. 3146) its failure to state a case for such relief strongly suggested that the tool company was made a defendant merely for the purpose of giving a fictitious appearance of jurisdiction. But the bill was amendable in these respects (if the facts would justify, People v. McCaffrey, supra), even on the hearing of the plea in abatement, and, being so amendable, did not conclusively show lack of jurisdiction to hear the application for temporary injunction, even though, as it finally turned out, the facts would not justify amendment in these respects.

Upon the hearing of the injunction application plaintiff in error was sworn as a witness. It was in the course of that examination that the alleged false testimony was given. During the hearing of the injunction application the other facts recited on page 3 of our opinion in No. 3146 (258 Fed. 409, 410, 169 C. C. A. 425, 426), were developed, which contributed largely to our conclusion of identity of interest in fact between the two corporations. Probably no one would doubt the court's jurisdiction to take testimony directly upon the question of that jurisdiction (Markey v. State, supra); but we think it clear that the court had jurisdiction to receive testimony in a single hearing upon the merits of the application for injunction in connection with the subject of its own jurisdiction, and that false testimony relating to the merits, in the connection stated, would constitute perjury equally as if aimed directly at jurisdiction. The alleged false testimony was material to the issue on the merits. We cannot think that the question of jurisdiction to take plaintiff's testimony, and thus the question of perjury or no perjury in giving it, could depend upon the subsequent affirmative conclusion, largely from testimony dehors the record, that the actual diversity of citizenship between plaintiff and the tool company, alleged in the bill and existing in fact, failed to give jurisdiction because of identity of interest between those parties.

[4] 3. The alleged assault on Wise occurred while he, Reichel, and a few other molders were being escorted by guards from the works to their respective homes, accompanied by a large and excited crowd said to contain several hundred people. There was testimony that Wise and Reichel were together until Wise was stopped and was engaged in conversation, and was subsequently struck by plaintiff in error, in front of Bruning's gate on Third street; Reichel having

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meanwhile moved south in the crowd to an alley called Race street, which formed the southern boundary of the Bruning lot. Against objection of irrelevancy and incompetency, the government was permitted to show that plaintiff in error struck Reichel at the alley at a point, according to the varying statements of witnesses, from 15 to 50 feet from Bruning's gate. The trial judge, in a charge to which no exception was taken, instructed the jury that the issue was merely "what took place between [plaintiff in error] and Carl Wise in front of Bruning's house on the 10th of September, and what was there said and done," and that plaintiff in error should be acquitted "if he did not hit Wise at that time and place"; that he was not on trial for striking Reichel, and that the testimony concerning the alleged striking of the latter was admitted "for the purpose of letting the jury see the whole scene and what was taking place at that time, because whatever happened, happened within a very short time, there is evidence tending to show. So what was going on, and the circumstances under which the conversation took place between Wise and West, and as reflecting upon the conversation and the credibility of the witnesses."

The question is whether the alleged assault on Reichel falls within the rule which admits proof of acts committed as a part of the same transaction or a continuation of the main transaction, for while plaintiff in error was not on trial for assault or threats, but for perjury, the issue of fact was the same, viz. whether the alleged assault and threats were actually made, and on this issue the rule of evidence would be the same. A correct statement of the rule of res gestæ and its limitations is found in 16 Corpus Juris, 572–574, which we quote in the margin.[2] Whether or not the rule of res gestæ applies here

[2] "I. *Res Gestæ.* 1. *In General.*—Matters constituting a part of the res gestæ are admissible in evidence, the rules as to admissibility, and as to what constitutes the res gestæ, being the same in criminal as in civil cases. The res gestæ is not confined to the act charged, but includes acts, statements, occurrences, and circumstances forming a part or a continuation of the main transaction. Conversely, matters so separated or disconnected in point of time or circumstance from the act charged as not to be a part of a continuous transaction are no part of the res gestæ of the act. While the question of res gestæ depends in a great measure on the circumstances of each case, especially as regards the matter of time, and a certain measure of discretion is vested in the trial court, certain general principles are regarded as well settled. For an act or declaration to be included in the accompanying circumstances which may be given in evidence with the principal fact or transaction, there must be a principal fact or transaction, the idea of res gestæ presupposing a main fact; and to be admissible as part of the res gestæ the act or declaration must be substantially contemporaneous with the main fact, must spontaneously spring out of it, must tend to illustrate, elucidate, or characterize it, must so harmonize and be connected with it as obviously to constitute one transaction, and must not in effect be a mere narrative of a past occurrence. However, the word 'contemporaneous', as employed in the rule, is not to be taken in its strict meaning, nor is time the only criterion for determining whether a thing said or done is part of a given transaction, although closeness in point of time is an element for consideration; the ultimate test is spontaneity and logical relation to the main event, and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstance and at a time so near it as to

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depends on whether the record would reasonably support a conclusion that the alleged assaults on Wise and Reichel were, in effect, parts of one and the same transaction, and substantially contemporaneous.

There was testimony that while plaintiff in error was talking to Wise, after calling him a "scab" and threatening to "get him" if he returned to work the next day, some one in the crowd around Reichel called out "Hit him," whereupon plaintiff in error struck Wise and went hurriedly to the place where Reichel was apparently already under assault, and there struck Reichel. According to this testimony, the difference in time between the two alleged assaults was not necessarily more than a very few seconds. Considering all the evidence in the case, including the attempt (which it was open to the jury to infer) on the part of strikers and strike sympathizers to prevent operation of the works, the occasion for the gathering of the crowd, its hostility generally toward employés persisting in remaining at the works, and the permissible inference that plaintiff in error, who was a member of the Molders' Union local, was a strike sympathizer, we think it would support a finding that the two alleged assaults were practically contemporaneous, and were parts of one and the same transaction. This being so, it was not error to admit it or to refuse to instruct the jury not to consider it.

This view is specifically supported by Smith v. State, 88 Ala. 73, 76, 7 South. 52, 53, where in a prosecution for murder it was said that the act of the defendant, after inflicting a death wound on the deceased, in pursuing the latter's companion, and firing at him as he ran, "was not only part of the res gestæ, but tended strongly to show the hostile spirit under which he was acting"; May v. Commonwealth, 153 Ky. 141, 149, 154 S. W. 1074, where, in a prosecution for killing a woman, evidence that defendant killed the latter's husband, just before he killed her, was held admissible, not only as part of the res gestæ, but because showing the unlawful intent or motive for killing the wife, and this notwithstanding the fact that defendant had already been convicted under a separate indictment for killing the husband; State v. Schrum, 255 Mo. 273, 277, 280, 164 S. W. 202, where defendant was charged with shooting first one man and then another whom he came upon together, the shooting of the second was held admissible as part of the res gestæ upon the trial of the first; People v. Murphy, 276 Ill. 304, 306, 307, 321, 322, 114 N. E. 609, where in a prosecution growing out of a raid upon some Greeks living in a railroad car, in which one was shot within the car and the other after, in the course of the mêlée, he had gotten outside the car, the testimony as to the second homicide was held admissible on the trial of the indictment under the first, conviction being had under each indictment; State v. McCahill, 72 Iowa, 111, 116, 30 N. W. 553, 33 N. W. 599, where in a prosecution for assault, growing out of a strike, evidence of threats against another party, made immediately

preclude the idea of deliberation and fabrication, it is to be regarded as contemporaneous within the meaning of the rule. In determining what is admissible as part of the res gestæ, no distinction usually is, nor indeed can be, drawn between statements and acts."

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after the killing of deceased, was held competent. For application of the rule to prosecutions for offenses other than assaults, see State v. McDowell, 61 Wash. 398, 403, 112 Pac. 521, 32 L. R. A. (N. S.) 414, Ann. Cas. 1912C, 782, and cases cited; People v. Mead, 50 Mich. 228, 231, 15 N. W. 95; Pirscher v. United States (C. C. A. 5) 133 Fed. 526, 67 C. C. A. 660; Sartin v. State, 7 Lea, 679.[3]

[5] 4. Finally, plaintiff in error contends that there was not enough substantial evidence of the untruth of his testimony in the injunction case to justify a finding of perjury beyond a reasonable doubt.

It is true that but two witnesses testified that plaintiff in error either struck or threatened Wise, and the testimony of these witnesses was directly disputed by that of seven or eight others. There were also other facts and considerations tending, in greater or less degree, to discredit the testimony of each of the two witnesses referred to. Each, however, testified positively that plaintiff in error had both struck and threatened Wise. The situation raised, at the most, a question of credibility, and the credibility of witnesses and the trustworthiness of their testimony are peculiarly questions for the jury. Rochford v. Pennsylvania Co. (C. C. A. 6) 174 Fed. 81, 83, 98 C. C. A. 105. If the jury believed these witnesses, there was substantial testimony sustaining the charge of perjury. The trial judge, who saw and heard the witnesses, denied a motion for a new trial on the ground, among others, that the verdict was not sustained by sufficient evidence and was manifestly against the weight of the evidence. We cannot disturb the verdict for insufficiency of evidence. Kelly v. United States (No. 2978, decided by this court January 7, 1919) 258 Fed. 392, 169 C. C. A. 408, and cases cited in note under paragraph 5; Matthews v. United States, 192 Fed. 490, 113 C. C. A. 96.

It results from these views that the judgment of the District Court should be affirmed.

[3] The government contends that the record shows that the alleged assault on Reichel preceded that on Wise. If so, the evidence in question would be, if anything, even more directly in point. We think the view that the alleged assault on Wise preceded that on Reichel is the better one; but the question of priority is not, in our opinion, highly important.

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(258 Fed. 422)

In re C. JUTTE & CO.

Appeal of GRIBBLE et al.

(Circuit Court of Appeals, Third Circuit. June 19, 1919.)

No. 2424.

1. BANKRUPTCY ⟸88(2)—INTERVENTION—PETITION.
A petition to intervene in a bankruptcy case, after an order of adjudication or dismissal has been made, is addressed to the discretion of the court.

2. BANKRUPTCY ⟸99—DISMISSAL OF PETITION—WHAT CONSTITUTES.
Though a court of bankruptcy expressed an opinion indicating its purpose to dismiss an involuntary petition, yet where no order of dismissal was drawn, as directed by the opinion, the petition in bankruptcy is not dismissed, and remains pending.

3. BANKRUPTCY ⟸88(2)—INTERVENTION—RIGHT TO INTERVENE.
Where no order dismissing an involuntary petition in bankruptcy had been entered, though the trial court had expressed the opinion that it should be dismissed, *held* that, under Bankruptcy Act July 1, 1898, § 59f (Comp. St. § 9643), declaring that creditors other than the original petitioners may at any time enter their appearance and join in the petition, such creditors might intervene, regardless of their laches, so long as the petition has not been formally dismissed.

Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

In the matter of the bankruptcy of C. Jutte & Co. From an order dismissing the petition of E. B. Gribble and another, creditors, for leave to intervene, they appeal. Reversed.

A. Devoe P. Miller, of Pittsburgh, Pa., for appellants.

Robert J. Dodds, of Pittsburgh, Pa. (George D. Wick and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., of counsel), for appellee.

Before WOOLLEY and HAIGHT, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge. The single question in this case concerns the right of creditors of an alleged bankrupt, other than original petitioners, to appear at any time before the decision of the issue of bankruptcy and join in the petition, under authority of section 59f of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 561 (Comp. St. § 9643).

The unexplained neglect of the appellants promptly to prosecute the right they now assert deprives them of every consideration of equity. If the right still exists, it does so only by force of the statute construed very strictly with reference to the facts.

In April, 1908, a petition in bankruptcy was filed against C. Jutte & Company, a Pennsylvania corporation. In due course, the company filed an answer denying that it had engaged in any trade or pursuit that brought it within the operation of the Bankruptcy Act. In September, 1908, the property of the company was sold under mort-

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gage foreclosure, and the proceeds distributed to the holders of the accompanying bonds. Excepting the allowance in 1911 of a creditor to intervene and join in the petition, nothing more was done until April 22, 1912, when E. B. Gribble and Jane C. Jutte, owners of the Tug "Independent," the appellants in this case, petitioned for leave to intervene as creditors and join in the bankruptcy petition. On rule to show cause, the alleged bankrupt opposed this petition on the ground that it was not indebted to the petitioners, and that, in any event, the petition to intervene should be denied because of laches. On July 19, 1912, the court made an order of reference to a referee in bankruptcy, "to determine whether the said petitioners, E. B. Gribble and Jane C. Jutte, doing business as the Tug "Independent," are creditors of said C. Jutte & Company."

On September 13, 1912, with the reference of Gribble's and Jutte's petition still outstanding, Judge Orr, sitting in the District Court, handed down an opinion on the issue of bankruptcy raised by the company's answer to the original petition, in which he held that the alleged bankrupt, being engaged in the business of transportation, and not being "engaged principally in manufacturing, trading, printing, publishing, binding, or mercantile pursuits," was not such a corporation as can be adjudged a bankrupt. He therefore held against the motion for adjudication.

A year later, in October, 1913, the referee made a report on the order of reference. He found the alleged bankrupt indebted to Gribble and Jutte but in a lesser sum than they claimed, and found also, in view of the opinion of the court filed in September of the previous year holding that the alleged bankrupt corporation could not be adjudged a bankrupt, that Gribble and Jutte should not be allowed to intervene, but should be relegated to their right as creditors to file a new petition. On October 13, 1913, Gribble and Jutte filed exceptions to the report of the referee, first, as to the amount of the indebtedness found, and second, as to the disallowance of the petition to intervene. Later, the exceptions were renewed (March 8, 1915), but were not pressed until July 2, 1918, when they were disposed of by Judge Thomson, sitting in the District Court, on an order overruling the exceptions and dismissing the petition to intervene on the ground of laches. It was from this order (not from Judge Orr's order) that Gribble and Jutte took this appeal.

[1-3] The appellants base their appeal on Section 59f of the Bankruptcy Act, which provides, that "creditors other than original petitioners may at any time enter their appearance and join in the petition. * * *" Relying on the broad terms of this provision, the appellants claim, that, notwithstanding their seemingly inexcusable delay in entering an appearance, they have a right under the statute, being creditors, to appear "at any time" and join in the petition of bankruptcy. The appellee, arguing as though the petition in bankruptcy had been dismissed and as though the appellants claim a right to appear "at any time" *thereafter,* maintains that the allowance of a petition to intervene in such a case is not based on a statutory right but is purely discretionary with the court and should be denied, unless

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the application be seasonably made. The cases cited in support of the latter contention hold quite uniformly, that a petition to intervene *after* an order of adjudication or dismissal has been made, that is, after the issue of bankruptcy has been determined, is addressed to the discretion of the court. In re First National Bank of Belle Fourche, 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355; In re Jemison Mercantile Co., 112 Fed. 966, 50 C. C. A. 641; In re Koenig & Van Hoogenhuyze (D. C.) 127 Fed. 891; 1 Loveland on Bankruptcy, 467. But the rule of these cases, which no one questions, is not applicable to this case, because, through inadvertence of counsel, or otherwise, Judge Orr's opinion was not followed by an order dismissing the original petition. We thus have a situation in which the court has expressed its conclusion on the issue of bankruptcy but has not reduced it to judgment. We are not unmindful of the distinction between the rendition of a judgment and the record of a judgment rendered. 15 R. C. L. 571, 572, 578. The trouble here is that while the views of the court were expressed in an opinion indicating its purpose to render a judgment in accordance with them, no judgment has, in fact, been rendered. The last act of the court was the direction: "Let an appropriate order be drawn." None was drawn. Until the order is drawn and signed, the original petition in bankruptcy is not dismissed. It remains pending, and so long as it is pending and the issue of bankruptcy is not disposed of by an order of adjudication or dismissal, creditors, other than original petitioners, stand where the statute places them, and they may, by authority of the statute as construed by the courts, intervene and join in the petition. In re Stein, 105 Fed. 749, 45 C. C. A. 29 (C. C. A. 2d); In re Charlestown Light & Power Co. (D. C.) 183 Fed. 160; In re Lutfy (D. C.) 156 Fed. 873; In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434 (C. C. A. 8th). Advantageous as would be the application of the doctrine of laches to this case, we find nothing in the statute or in the cases construing the statute, which indicates that tardiness or delay deprives creditors, other than the petitioners, of the right to avail themselves of the original petition at any time during its pendency.

In reaching the conclusion to which we are driven, we realize that in this case we are running very nearly counter to the maxim: Lex nil frusta facit. We wish, however, to make it clear, that, as this appeal is only from Judge Thomson's order, our decision affects in no way the views of Judge Orr as expressed in his opinion, and limits in no degree his freedom of action in dealing with the matter as it has been presented to him, or as it may again be presented to him.

The order dismissing the appellants' petition to intervene is reversed.

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(258 Fed. 425)

SNARE & TRIEST CO. v. ST. PAUL FIRE & MARINE INS. CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 179.

1. INSURANCE ⟸272—APPLICATION FOR MARINE INSURANCE—"DOCKED."
The word "docked," as used in application for marine insurance, *held* not to be ambiguous, but to mean dry-docked.

2. INSURANCE ⟸265—MARINE INSURANCE—ACTION ON POLICY.
A statement in an application for a marine policy on a vessel, "warranted docked and overhauled," not carried into the policy, is a representation only, and in an action at law on the policy may be shown to have been substantially performed.

3. INSURANCE ⟸255—REPRESENTATION IN APPLICATION—MATERIALITY.
Where the underwriter requests information in the application which, when given, amounts to a representation, such answer to a specific question is conclusively presumed to be material to the risk.

4. INSURANCE ⟸312—MARINE INSURANCE—PROMISSORY REPRESENTATION.
A representation in an application for insurance on a vessel during a voyage, that she will be dry-docked and overhauled before the voyage, is promissory, and a substantial compliance with it is sufficient to sustain the contract.

5. INSURANCE ⟸312—MARINE INSURANCE—SUBSTANTIAL COMPLIANCE WITH PROMISSORY REPRESENTATION.
A representation in the application for a marine policy that the vessel would be dry-docked and overhauled before the voyage may be shown to have been substantially complied with by proof which warrants a finding that, while not dry-docked, she was made entirely seaworthy, and was in as good condition as she would have been made if dry-docked.

In Error to the District Court of the United States for the Southern District of New York.

Action by the Snare & Triest Company against the St. Paul Fire & Marine Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed.

In October, 1913, the Snare Company (plaintiff here and below) owned a certain scow lying at the time in the harbor of Havana, Cuba, where she had been for some time. Plaintiff employed Johnson & Higgins to procure marine insurance on this scow, which they intended to bring back to the United States. These brokers made written application on behalf of plaintiff to the general agent of defendant insurance company for $4,000 on hull, etc., of scow, to cover "at and from Havana to Charleston direct or otherwise (in) tow (of) the Barnett," a tug.

This application the insurer declined until it had been amended or changed by the insertion of the following words: "Warranted dkd and overhauled 1913." As changed or amended, insurance was granted, and one copy of the application was kept by the insurer and the other delivered to Messrs. Johnson & Higgins. The date of written application was October 9, 1913. On October 16th the insured issued its "certificate of insurance," under the "office policy" of defendant's general agent, which certificate, for the purpose of this case, may be taken as the policy of insurance. Neither in words nor substance was the phrase "Warranted dkd and overhauled 1913" inserted or expressed in said policy.

On October 30th the Barnett took this scow in tow and started from Havana to Charleston. Forty-eight hours after leaving a storm arose, said to have been of great severity, which "finally washed to pieces" the scow, which thus became a total loss. This action was brought to recover upon the policy.

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There was evidence tending to show that the scow had been thoroughly caulked, overhauled, and painted, hatches secured with tarpaulins and put in "seaworthy and * * * first-class condition" before starting upon the voyage on which she was lost. But she had not been dry-docked in the year 1913, and before leaving Havana. Evidence was also introduced or offered to show that the overhauling and repairing of the scow put her in as good condition as she would have been had a dry dock been used.

The trial court took evidence tending to show that the word "dkd" was not only an abbreviation for "docked," but meant "dry-docked," and refused to submit any question to the jury, except the authority of Johnson & Higgins to apply for or accept insurance after making such representation or warranty as is embodied in the phrase "Warranted dkd and overhauled 1913." The jury found in favor of the authority of Johnson & Higgins by rendering a general verdict in favor of defendant on the single question submitted to them. Plaintiff took this writ.

Hector M. Hitchings and J. Elmer Melick, both of New York City, for plaintiff in error.

Oscar R. Houston and Harrington, Bigham & Englar, all of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] While under the jury's verdict we must hold that the word "docked" meant "dry-docked," we are of opinion that under the other circumstances shown no evidence was necessary to reach this conclusion. The acceptance of the application closed the contract for insurance; when and as approved by the insurer or his agent it was in substance a "binder" (Muller v. Globe, etc., Co., 246 F. 759, 159 C. C. A. 61), although no formal paper called a binder was in this case issued—a practice frequently followed. The word "docked," when used in such an instrument, is not ambiguous, but clear and precise, and needs no parol evidence to explain it. Hearn v. New England, etc., Co., 3 Cliff. 318, Fed. Cas. No. 6301. The word meant "dry-docked."

[2] But the insurance contract was not permitted to remain in the inchoate form of approved application or binder. A policy was issued and in force before the beginning of the voyage upon which the scow was lost, and into that policy the phrase out of which this controversy arose was not carried; it never became a part of the policy of marine insurance upon which this action is brought. As was held in Dow v. Whetten, 8 Wend. 160:

"The * * * application for insurance is admissible in evidence to show the intention of the parties. In a court of law it is proper evidence only to show a misrepresentation; in equity it may be used to correct the policy."

This being an action at law, the words in question must be treated as a representation only. A warranty, being a part of the policy, must be strictly and literally performed. Hazard v. New England, etc., Co., 8 Pet. 580, 8 L. Ed. 1043. But "a representation to the underwriters need only be substantially performed." Pawson v. Watson, 2 Cowper, 785. See, also, Gow on Marine Insurance (3d Ed.) p. 266, and Hughes v. Union, etc., Co., 8 Wheat. 307, 5 L. Ed. 620.

[3] In considering the effect of a representation upon a policy of

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insurance, the first inquiry is as to its materiality, and the point has been "much considered whether the materiality of a misrepresentation or a concealment is a question of law which the court determines or a question of fact to be submitted to the jury." Parson on Marine Insurance (Ed. of 1868) vol. 1, p. 463. But where the underwriter requests the information, which when given amounts to a representation, such answer to a specific question is conclusively presumed to be material to the risk. Kerr v. Union, etc., Co., 130 Fed. 415, 64 C. C. A. 617.

[4] The evidence in this case is at least sufficiently full to warrant a jury in finding that the meaning and intent of this representation was that the scow to be insured would be "dry-docked and overhauled" before she started upon her voyage from Havana to Charleston in tow of the Barnett. Such a representation is promissory, and we adopt the ruling of Wallace, J., in Lunt v. Boston, etc., Co. (C. C.) 6 Fed. 562, that a substantial compliance with a promissory representation is sufficient to sustain a contract for marine insurance.

[5] This brings us to the question whether an overhaul without dry-docking, which did as matter of fact make the scow entirely seaworthy, and which was as thorough an overhauling or reconditioning as could have been given to the vessel if put in dry dock, is or can be a substantial compliance with the admitted representation here in controversy.

The exact question has not apparently been considered in any reported case; but, having regard to what was indicated as a substantial compliance in the Lunt and Pawson decisions, supra, we feel justified in holding that there may be, and there is in this record, evidence tending to show that the scow was, at and before voyage commenced, substantially in the condition of seaworthiness indicated or defined by the phrase "to be dry-docked and overhauled."

We express no opinion on this matter of fact. Most modern suits on policies of marine insurance are in admiralty, and the court determines the facts as well as the law; but whether a compliance is substantial or not is a question of fact, and therefore at common law for the jury, subject always to such limitations as to materiality and relevancy of testimony as are by law imposed.

Because the trial court refused to submit this question to the jury, we think error was committed. It may be noted that the point actually sent to the jury, viz. the authority of the brokers, seems to us entirely immaterial in this case. If the brokers exceeded their authority or departed therefrom, they may be liable as unfaithful agents; but, in respect of procuring this insurance, whatever they did within the usual wide authority of such brokers was done by Snare Company.

Further, this defendant is only liable, in an action on a policy, on the particular kind of policy issued and in suit. That the broker got a document not wanted does not per se vary or increase the liability of the insurer.

Judgment reversed, with costs, and new trial ordered.

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(258 Fed. 428)

VIRGINIAN RY. CO. v. HALSTEAD.*

(Circuit Court of Appeals, Fourth Circuit. April 24, 1919.)

No. 1676.

1. MASTER AND SERVANT ⟸286(15)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY—SWITCH TARGET NEAR TRACK.
Where a brakeman, required in course of duty to mount the ladder on the side of a moving car, was injured by his foot being struck by a switch target six or seven inches from the passing ladder, proof that the construction of the switch was in accordance with the custom of railroads is evidence of due care, but not conclusive, and the court cannot hold as matter of law that so narrow a space was reasonably safe.

2. MASTER AND SERVANT ⟸286(1), 288(1)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.
In an action for injury to a brakeman, the questions of negligence and assumption of risk *held* properly submitted to the jury.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action at law by Vernon Halstead, by Nora Halstead, his next friend, against the Virginian Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter H. Taylor, of Norfolk, Va. (Loyall, Taylor & White, of Norfolk, Va., on the brief), for plaintiff in error.

Thomas H. Willcox, of Norfolk, Va. (Earl W. White and Willcox, Cooke & Willcox, all of Norfolk, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. [1] The plaintiff Vernon Halstead recovered a judgment against Virginian Railway Company for injuries alleged to be the result of defendant's negligence. The facts are not in dispute. At the time of the accident, plaintiff was a brakeman in defendant's barney yard between Jamestown Boulevard and Sewell's Point, in Norfolk county, Va. In this yard cars loaded with coal are collected and send by gravity to the scales and thence to the coal piers. For this movement it was necessary for the brakeman to throw the switch in order to shift the cars from one track to another, and then mount the moving car by a ladder and set the brakes. On August 26, 1917, this duty was required of Halstead. He threw the switch, went between the switch and the track a few feet beyond the switch in the direction from which the cars were coming, stepped on the ladder, and while pulling himself up to a standing position was struck on the foot by the switch target as the cars passed.

The defendant assigns error in the refusal to instruct the jury to find for defendant for lack of any evidence of negligence. The charge of negligence depends entirely on the uncontroverted fact that there was a clear space of only six to seven inches between the ladder and the switch target, alleged to be insufficient for the safety of the brake-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 250 U. S. 660, 40 Sup. Ct. 10, 64 L. Ed. —.

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man mounting the car. Atkins, a former employé on the yard, testified that the distance between the car and the target was unsafe; that he had so reported it to his superiors; that some of the switches on the yard had been changed for that reason; that he had been grazed by this target while standing on the ladder. Garrett, another employé, testified that he had changed some of the switches because conductors and brakemen had complained of the danger, and he believed the clear space to be too small; that he did not change this particular switch because the embankment was too narrow. There was also testimony that plaintiff's course in throwing the switch and stepping on the ladder was usual and proper.

On behalf of defendant there was testimony to the effect that a man standing straight in the stirrup will pass the target safely, but if he leans out he is liable to be caught. Hanes, superintendent of this coal terminal, testified that the rod of the switch target was standard; that the distance of the target from the track was the standard distance used, not only by defendant, but by other railroads.

The defendant's first position is that the construction of the switch, including the length of the switch rod, and the distance between the passing car and the switch target, was an engineering question, and that, since the construction was proved to be standard, the court should have held it to be reasonably safe as a matter of law, and therefore should have directed a verdict for the defendant. To sustain this position defendant relies on Tuttle v. Milwaukee Ry. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114, wherein the court said:

"We have carefully read the evidence presented by the bill of exceptions, and although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question. (For analogous cases as to the right of a manufacturer to choose the kind of machinery he will use in his business, see Richards v. Rough, 53 Mich. 212 [18 N. W. 785]; Hayden v. Smithville Man. Co., 29 Conn. 548, 558.) The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movement of their cars that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employés. The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto; and, if they decide to do so, they must be content to assume the risks."

In that case the brakeman was injured by the slipping of the drawbars while he was coupling cars from the inside of a curve. The court further held that the tendency of the drawbars to slip on the curve was an obvious danger which the brakeman assumed.

The language quoted must be accepted as an accurate statement of the law applicable to the facts of the case, but the doctrine must be strictly limited, unless we are to allow railroad experts to take away

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from juries and themselves decide questions of their own negligence. As we had occasion to say in Norfolk & W. Ry. Co. v. Gillespie, 224 Fed. 316, 139 C. C. A. 552, the engineers may be the final judges of the proper construction of a curve; but when the elevations and safeguards were proved, "the issue which was properly submitted to the jury was whether, considering the method of construction which the defendant had chosen to adopt, it was not negligence to require its engineers to run over the curve at the speed required by the schedule." Union Pacific Ry. Co. v. O'Brien, 49 Fed. 538–547, 1 C. C. A. 354. So, in the present case, the proper distance between the switch target and the passing car may be altogether an engineering question, under ordinary conditions. But jurors know as well as engineers the space that a man's body occupies and the way men usually handle themselves. Hence when, in the operation of cars and switches, brakemen are required to place their bodies between a switch target and a passing car, proof that the construction of the switch was in accordance with the custom of railroads is evidence of due care, but not conclusive evidence. The issue of what is a reasonably safe clear space is to be decided by the jury under all the evidence, in the light of common observation and experience. Surely there is no principle which requires a court to say as a matter of law that a clear space of only six or seven inches was safe.

[2] The evidence required the defense of assumption of risk to be submitted to the jury. Plaintiff testified he had been working as a brakeman only about a month, and had never worked at this switch before the time of the accident, that he did not know the distance from a passing car to the switch target, and that he had never been warned of the danger. It is true that the distance between the railroad track and the target was obvious, but that did not make obvious the distance between the side of the car and the target. Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Norfolk & W. Ry. Co. v. Gillespie, 224 Fed. 316–324, 139 C. C. A. 552; Gila R. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521. Nor was it plainly evident that the plaintiff without reason chose the dangerous place of mounting the car on the east side of the target, when there was a safe place on the west side after the car had passed the target, for he testified that the car would have reached the stopping place before he could have got up on the west side. The issues of negligence of defendant and assumption of risk and negligence of plaintiff were properly submitted to the jury.

Affirmed.

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(258 Fed. 431)

HUNTINGTON et al. v. DICKINSON et al.

(Circuit Court of Appeals, Fourth Circuit. April 18, 1919.)

No. 1670.

1. JUDGMENT ⇐747(1)—CONCLUSIVENESS—EJECTMENT—PERSONS NOT PARTIES—LANDLORD AND TENANT.
Under Code W. Va. 1913, c. 90, § 35 (sec. 4103), providing that a judgment in ejectment shall be conclusive as to the right of possession upon the party against whom rendered and all persons claiming from, through, or under him, by title accruing after commencement of suit, a judgment against the tenant, in an ejectment suit to which the landlord is not a party, does not affect the landlord's title.

2. JUDGMENT ⇐684—CONCLUSIVENESS—PERSONS CONCLUDED.
A judgment in a suit for the purchase money of land, allowing defendant therein credit for a parcel in dispute as for a deficiency, because of a recovery in ejectment by a third person against vendor's tenant, is not available as a finding that plaintiff had no such title as vendee was bound to accept, in a subsequent action to recover the disputed parcel, brought against those claiming under plaintiff in the ejectment suit.

3. EQUITY ⇐436—COMMISSIONERS' DEEDS—EFFECT.
A release given by a commissioner on order of the court covering a parcel of land, title to which was in dispute in a suit for the purchase price, has the effect of a quitclaim deed under Code W. Va. 1913, c. 72, § 3 (sec. 3780).

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action in ejectment by John Q. Dickinson and another against Arabella D. Huntington and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

George J. McComas, of Huntington, W. Va. (Enslow, Fitzpatrick & Baker, of Huntington, W. Va., on the brief), for plaintiffs in error.

C. W. Campbell, of Huntington, W. Va. (John F. Brown, of Charleston, W. Va., and G. W. McClintic, of Charleston, W. Va., on the brief), for defendants in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In the action of ejectment for several thousand acres of land, it turned out that the only controversy was over a triangular parcel containing 400 acres. Jury trial was waived, and the District Court found for the plaintiff.

On October 24, 1794, Joseph Skiles under a Virginia land warrant entered 40,000 acres of land in Kanawha county; but the warrant was not perfected into a grant until June 11, 1798. In the meantime, on November 11, 1794, John Steele under a like warrant entered 19,500 acres in the same county, and procured a grant therefor on December 1, 1794. By stipulation it was agreed that defendants Arabella D. Huntington and others had a regular chain of title under the senior Steele grant of 1794; the plaintiff denying, however, that the land in controversy was embraced in the grant. It was also stipulated that

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the plaintiffs John Q. Dickinson and Mary D. Dickinson had a chain of title from the junior Skiles grant, embracing the land in dispute, regular in all respects, except in the three particulars mentioned below.

The reasoning of the District Judge leading to the conclusion of fact that the land in controversy was not covered by the Steele grant, and that it was covered by the Skiles grant, is so clear and convincing that nothing of value can be added to it. The defendants contend, however, that even if it be true the land is not covered by the senior grant under which they claim, yet plaintiffs cannot recover possession under the grant to Skiles, for three reasons thus stated by counsel:

"(1) They claim title through and under a deed from D. C. Gallaher, special commissioner, that is not legally sufficient as a muniment of title.

"(2) They claim under John D. Lewis and his heirs, who are estopped to deny the ownership by the plaintiffs in error of the interlock in controversy.

"(3) They are barred from a recovery in this case by a recovery had by C. P. Huntington against John Lewis Taylor, tenant of Norris & Clark, the grantees of John D. Lewis."

For the sake of clearness we take up first the third defense. In July, 1875, Collis P. Huntington, defendants' predecessor in title, recovered by default a judgment in ejectment for the land in dispute against John Lewis Taylor, who entered as a tenant of John D. Lewis, plaintiffs' predecessor in title. Before the judgment in ejectment was obtained by Huntington, Lewis sold about 40,000 acres, including the land in dispute, to Norris & Clark. Neither John D. Lewis nor Norris & Clark were parties to the action of ejectment. But, before the writ in ejectment was executed, first Norris & Clark, and then John Q. Dickinson and Mary D. Dickinson, after they acquired the title of Norris & Clark, intervened in the action of ejectment, and sought to prevent the execution of the writ and secure a review of the judgment, on the ground that as claimants of title and possession they were not bound by the judgment, and should be allowed to appear and defend the action against the tenant. Their applications were denied on the ground that the court had no jurisdiction to open the judgment after the expiration of the term in which it was entered. But in affirming the judgment and denying the applications this court said:

"The conclusion reached is without prejudice to the right of the plaintiffs in error to take such appropriate action as they may be advised to, looking to the recovery of the interests they have, if any, in the property in controversy, and we do not mean to express any opinion regarding such future litigation, or any question that may arise therein."

All the details of the long and complex litigation are set out in the opinion of the District Court and of this court. Dickinson v. Huntington, 185 Fed. 703, 109 C. C. A. 523; Huntington's Devisees v. Taylor (C. C.) 156 Fed. 700.

[1] Section 35 of chapter 90 (sec. 4103) of Code of West Virginia provides as to judgments in ejectment:

"Any such judgment in an action of ejectment shall be conclusive as to the right of possession established in such action, upon the party against whom it is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action," etc.

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Under this statute this court has held that a recovery in an action of ejectment against a tenant to which the landlord is not a party does not adjudicate the title of the landlord. King v. Davis (C. C.) 137 Fed. 198; Id., 157 Fed. 676, 85 C. C. A. 348. The judgment against the tenant, John Lewis Taylor, therefore, did not affect the title of Norris & Clark, or of John D. Lewis, or the plaintiffs, claiming under them.

[2] In a suit brought by John D. Lewis against Norris & Clark for the collection of the purchase money of the conveyance to them of the large tract of land, Norris & Clark were allowed credit at the acreage price agreed on for the 400 acres in dispute as a deficiency because of the recovery of Huntington against John Lewis Taylor, the tenant. Collis P. Huntington and the defendants claiming under him, not being parties to that suit, would not have been bound had the court held that the title of Lewis was good, and they cannot avail themselves of a finding that Lewis did not appear to have such title as Norris & Clark should be required to accept.

[3] As a result of the deduction of the price of the 400 acres in dispute in favor of Norris & Clark in their litigation with John D. Lewis, the court ordered Norris & Clark "to release" to the heirs of John D. Lewis the parcel of land described in the proceedings as the 400 acres recovered by Huntington. Upon their refusal to comply with the order, the court appointed D. C. Gallaher commissioner, and directed him on behalf of Norris & Clark "to make, acknowledge, and deliver to the heirs at law of John D. Lewis, purchaser at the sale aforesaid, a deed of release." Thereafter Gallaher, commissioner, executed an instrument, as a compliance with the order of the court, in which he undertook to grant and release the land to the heirs of Lewis. It is insisted that the commissioner had no authority to grant, and that a release did not carry the legal title to the heirs of Lewis. The point is disposed of by section 3 of chapter 72 (sec. 3780), Code of West Virginia, providing that a release shall have the effect of a quitclaim deed.

The contention that the land was not sufficiently identified in the order directing the release is equally untenable. There was only one 400-acre tract recovered by Huntington, and that was described in the action of ejectment of Huntington v. John Lewis Taylor.

Affirmed.

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(258 Fed. 434)

CAUGHMAN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 1, 1919.)

No. 1664.

1. WITNESSES ⟸414(1)—PROSECUTIONS UNDER ESPIONAGE ACT—CREDIBILITY OF ACCUSED—CORROBORATION—ADMISSIBILITY.
In a prosecution for violating Espionage Act June 15, 1917, wherein defendant asserted that he had always been a loyal citizen, and that he had tendered his services to the government in the war before charges were brought against him, it was error to exclude evidence as to whether he had received an acknowledgment from the government for offering his services, and whether he had it with him; the case turning on defendant's credibility.

2. CRIMINAL LAW ⟸338(1)—PROSECUTIONS FOR VIOLATING ESPIONAGE ACT —EVIDENCE—ADMISSIBILITY.
In a prosecution for violating Espionage Act June 15, 1917, testimony by a witness that he had been asked by the commissioner at the preliminary examination, if what he knew was not practically the same as that testified to by another witness, and that he responded in the affirmative, and that such evidence was true, was inadmissible, being irrelevant and collateral.

3. CRIMINAL LAW ⟸778(5) — INSTRUCTIONS — ESPIONAGE ACT — BURDEN OF PROOF—PRESUMPTION OF INNOCENCE.
In a prosecution for violating Espionage Act June 15, 1917, an instruction, at the close of an extended charge, that a man "comes in clothed with the presumption of innocence, and that presumption continues until, in the opinion of the jury, the evidence is sufficient to show that he is guilty beyond a reasonable doubt, and from that time the burden is on him to establish his innocence," was misleading and prejudicial; the burden always being on the prosecution.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Joseph M. Caughman was convicted of violating Espionage Act June 15, 1917, and he brings error. Reversed.

George B. Timmerman and G. T. Graham, both of Lexington, S. C. (Timmerman, Graham & Callison, of Lexington, S. C., on the brief), for plaintiff in error.

J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C. (Francis H. Weston, U. S. Atty., of Columbia, S. C., on the brief), for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The indictment on which plaintiff in error, herein called defendant, was tried contains six counts, each charging a violation at Lexington, S. C., of the Act of Congress approved June 15, 1917 (40 Stat. 217, c. 30), commonly known as the Espionage Act. There was a general verdict of guilty, with recommendation to mercy, and the case comes here on writ of error.

As the testimony in support of the several counts was clearly sufficient for submission to the jury, we pass by the assignments of error

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based on refusal to direct a verdict for defendant, and take up for brief discussion certain other rulings of the trial court which are made the subject of exception.

Testifying in his own behalf the defendant stoutly denied the treasonable utterances imputed to him by the government's witnesses, and asserted that he had always been a loyal citizen. In proof of this he stated that he had volunteered and served in the army during the Spanish-American war, that he had purchased a Liberty Bond and made contributions to the Red Cross, and that he had tendered his services to the government in the present war before these charges were brought against him. In connection with the latter statement the record shows:

"Q. Did you get any acknowledgment from the government for offering your services? A. Yes, sir. Q. Have you got it with you? A. Yes, sir—which questions were ruled out by the court, to which the defendant then and there excepted."

[1] We think this evidence was improperly excluded. The case turned on defendant's credibility. This was emphasized by the learned judge in his charge to the jury, when he said:

"But you have a right to consider the fact that he is on trial, and that his testimony tends to acquit; and just as you have a right to consider animosity is a human weakness, which may sway a witness, so, more strongly for you, you have a right to consider the credibility of the defendant, Caughman, that the desire to escape conviction and punishment may sway his testimony; it does not prevent you from believing him, but you have a right to consider it in estimating his credibility."

In short, the defendant was refused opportunity to prove conclusively, as he could have done, the truthfulness of an important statement made by him, bearing directly on the question of his loyalty, and the jury were in effect told that they might disbelieve everything he said. Taking into account the nature of the accusation against him, and the difficulty of meeting it except by his own denials, we are constrained to hold that the ruling here considered was erroneous and prejudicial.

[2] It appears that defendant had a preliminary examination before a commissioner, at which one Sawyer testified to certain disloyal declarations made by him at a time and place named. Taylor, another witness for the government, was present and heard Sawyer's evidence. At the trial in the court below, and after the close of defendant's testimony, Taylor was recalled and permitted, over objection, to answer questions as follows:

"Q. Did not the commissioner ask you what you knew about the case, or words to that effect, and what was your reply? A. You asked me, Mr. Weston, if what I knew in the case was practically the same as had been testified to by Mr. Sawyer and his brother. I said, 'Yes, sir,' and Mr. Sloan asked if that was true. Q. And you said 'Yes'? A. Yes, sir."

The record indicates that these questions were allowed because witnesses for defendant had testified that Taylor was not present at the preliminary; but this appears to have been a mistake, as no such testimony is found in the bill of exceptions. However that may be,

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we are aware of no rule of evidence which justified the inquiry. It clearly should have been excluded. The error was doubtless inadvertent, and of itself can hardly be regarded as serious; but it served to introduce at the last moment a purely collateral and irrelevant matter, which in the circumstances was liable to improperly affect the jury.

At the close of a somewhat extended charge, which did not in terms include the rule of presumption of innocence, the learned judge was asked "to charge the jury the rule that when a man comes into court he comes in presumed to be innocent." To this request the following reply was made:

"I shall charge them that the Supreme Court says that a man comes in clothed with a presumption of innocence, and that presumption continues until in the opinion of the jury the evidence is sufficient to show that he is guilty beyond a reasonable doubt, and from that time the burden is on him to establish his innocence."

[3] We cannot doubt that the concluding clause of this instruction, the last word from the court to the jury, was seriously misleading and prejudicial. It is clearly at variance, in our opinion, with the rule laid down in the familiar cases of Coffin v. United States, 156 U. S. 432, 458, 15 Sup. Ct. 394, 39 L. Ed. 481, and Cochran v. United States, 157 U. S. 286, 299, 15 Sup. Ct. 628, 39 L. Ed. 704, and frequently since repeated. For example, in Davis v. United States, 160 U. S. 469, 487, 16 Sup. Ct. 353, 358 (40 L. Ed. 499), the Supreme Court says:

"Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime."

The point needs no discussion. In the light of the cited cases it seems plain that the instruction under review gave to the jury an erroneous impression as to the continuing presumption of innocence, which, as said in Coffin v. United States, supra, "is an instrument of proof created by the law in favor of one accused."

Of the remaining assignments of error it is sufficient to say, without taking them up in detail, that careful examination discloses no grounds for reversing the judgment. On the whole case, however, and specially for the reasons above stated, we are led to the conclusion that the defendant is entitled to a new trial.

Reversed.

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(258 Fed. 437)

CLARK v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. June 14, 1919.)

No. 2455.

1. CRIMINAL LAW ⟸1129(2)—APPEAL—ASSIGNMENTS OF ERROR.
A criminal case record, containing superfluous and overlapping assignments of error, disapproved.

2. RECEIVING STOLEN GOODS ⟸8(3)—SUFFICIENCY OF EVIDENCE—OWNERSHIP BY UNITED STATES.
In prosecution under Penal Code, § 48 (Comp. St. § 10215), for having possession with intent to convert property stolen from United States, evidence *held* to sustain jury finding that property belonged to United States, despite mistaken references in shipping orders to date of contract under which government secured title.

In Error to the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

James Clark was convicted of having property stolen from United States in his possession with intent to convert the same, and he brings error. Affirmed.

On January 20, 1918, pursuant to an agreement made on the fourth day of the same month, United Metals Selling Company entered into a contract with the United States to make and deliver to it a large quantity of electrolytically refined copper for use in the manufacture of munitions. In obedience to orders made by the Ordnance Department of the Federal Government, the Selling Company directed the Raritan Copper Works, one of its subsidiaries, to deliver to the Erie Railroad Company for shipment to United States Inspector of Ordnance at the New Jersey Tube Company at Harrison, New Jersey, a quantity of the contract copper to be manufactured by the latter concern into munition parts under a contract between it and the United States. The bill of lading for the shipment recited the United States and carrier as parties and was in the form used especially for transporting government property. The copper was dealt with by the Copper Works, the Railroad Company, the government agents and the Tube Company as property of the United States. It was delivered by the Copper Works to the United States under contract, carried toward Harrison by the Railroad Company for the United States, and like consignments, not stolen, were received by the United States Inspector of Ordnance at Harrison as property of the United States and there worked into munition parts by the Tube Company under contract with the United States.

Men who were informed of a proposed shipment of copper from the Copper Works to the Tube Company boarded the train at a point at which it had stopped on the Jersey City "dumps," tossed out copper bars to the value of $4,500.00, hauled them to the premises of Clark and there hid them under circumstances involving his complicity in the transaction.

Wm. A. Kavanaugh, of Hoboken, N. J., for plaintiff in error.
A. J. Steelman, of Jersey City, N. J., for the United States.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and DICKINSON, District Judge.

WOOLLEY, Circuit Judge (after stating the facts as above). James Clark, Mendel Rankin, Louis Hanin, Julius Schlecter and Caesar Frazer were charged by one indictment with having in their possession

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goods and merchandise stolen from an interstate shipment (Act Cong. Feb. 13, 1913, c. 50, § 1, 37 Stat. 670 [Comp. St. § 8603]), and by another indictment with having in their possession with intent to convert to their use property of the United States which had theretofore been stolen by another person, knowing the same to have been stolen (Penal Code [Act March 4, 1909, c. 321] § 48, 35 Stat. 1098 [Comp. St. § 10215]). The trial proceeded by consent on both indictments against the first four named defendants. Frazer had not been apprehended. The court directed the jury to acquit Schlecter on both indictments and to acquit the remaining defendants on the first indictment. Under the second indictment, Clark, Rankin and Hanin were convicted. Rankin and Hanin submitted to sentence, and Clark alone sued out this writ of error.

We have presented to us thirty-eight assignments of error, which may be readily compressed into four groups, viz.: Errors (1) in the admission of evidence; (2) in the refusal of the court to charge as prayed; (3) in the instructions charged; and (4) in the court's refusal to direct a verdict of acquittal.

[1] This record with its superfluous and overlapping assignments of error constrains us to repeat the admonition of the Supreme Court in Chesapeake & Delaware Canal Co. v. United States, 250 U. S. 123, 39 Sup. Ct. 407, 63 L. Ed. 889:

"This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel on the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on." Phillips Construction Co. v. Seymour, 91 U. S. 646, 648 [23 L. Ed. 341]; Grayson v. Lynch, 163 U. S. 468 [16 Sup. Ct. 1064, 41 L. Ed. 230]; and Central Vermont Ry. Co. v. White, 238 U. S. 507 [35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252].

The assignments of error as we have grouped them resolve themselves into three questions: First, whether there were errors in the admission of evidence and in instructions which the court charged and refused to charge the jury; second, whether the evidence sustains the finding of the jury that property in the stolen copper was in the United States as laid by the indictment, and third, whether the evidence sustains the finding of Clark's complicity in the crime.

"Of course, in jury trials, erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless." Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 39 Sup. Ct. 435, 63 L. Ed. 853.

Applying this rule to the first question, we dispose of it without doing more than to say, that the trial court's rulings on evidence and its charge to the jury, covering instructions made and denied, were in nearly every instance free from error; and in the few instances open to doubt, it affirmatively appears, that if error was present, it was entirely harmless.

[2] We find no substance in the question of proof of property in the United States. This question as raised by the plaintiff-in-error is based on several mistaken references to a date of the contract between the United Metals Selling Company and the United States, con-

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tained in shipping orders from the Ordnance Department to the Selling Company, by which the Government proposed to prove property in itself. The references were to a contract between the Selling Company and the Government of January 4, 1918, when the contract obviously referred to bore the date of January 20, 1918. But the misreferences in these orders were instantly cured by correct references in the same orders to the contract by its contract number—G1875–360S. There can be no question that the contract bearing this number was the contract under which the orders were issued and the shipment was made and that it showed the Government's property in the copper. Aside from this contract as evidence of property, there was other evidence to the effect that the copper, when delivered by the Copper Company to the Railroad Company for transportation, and later when it was stolen in transit, was the property of the United States and had previously been accepted as such by its duly authorized agents. The defendants did not attempt to controvert the Government's testimony on this issue by testimony of their own; they merely challenged its accuracy and sufficiency.

The remaining question—the sufficiency of the evidence of Clark's complicity in the crime—is not open to dispute in view of the positive character of the Government's testimony and the negative character of the testimony produced by Clark. As the testimony for and against Clark was admitted with scrupulous regard to the rules of evidence in the trial of criminal causes, and as the jury have resolved that evidence against Clark, there is nothing for this court to do but direct that the judgment below be

Affirmed.

(258 Fed. 439)

THE AURORA.

THE LEONARD J. BUSBY.

(Circuit Court of Appeals. Second Circuit. May 14, 1919.)

Nos. 228, 229.

COLLISION ⟸66—VESSELS IN TOW—EVIDENCE.

Evidence *held* to show, contrary to finding below, that a tug failed to control her long tow, which swung with the tide into collision with libelant's tow, which was in its proper place near Staten Island shore.

Appeals from the District Court of the United States for the Eastern District of New York.

Libels by the Wright & Cobb Lighterage Company against the steam tug Aurora, her engines, etc., the Lehigh Valley Transportation Company, claimant, and by Owen J. McWilliams and others against the steam tug Leonard J. Busby, her engines, etc., the Wright & Cobb Lighterage Company, claimant, in which the steam tug Aurora and the Lehigh Valley Transportation Company, claimant, were impleaded. From an adverse decree, the Wright & Cobb Lighterage Company appeals. Reversed.

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Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, and Anthony V. Lynch, Jr., both of New York City, of counsel), for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Wright & Cobb Lighterage Company appeals from decrees entered in these proceedings.

On April 1, 1917, at 2 a. m., in the Kill von Kull, a collision occurred between the barge Blue Coat, the port boat in the fifth or last tier of the Aurora's tow, bound west with the flood tide, and the lighter Prince. The lighter was the outside boat of two, towed stern first, on the port side of the tug Leonard J. Busby. The Busby had the derrick lighter Luna on her starboard side and was navigating east against the tide. Both the Prince and the C. G. Mueller of the Aurora's tow were damaged. The owners (the libelants) libeled the Aurora, and a decree has been entered dismissing the libel. Owen J. McWilliams et al., owners of the Blue Coat, libeled the Busby, and the Wright & Cobb Lighterage Company, claimant, interpleaded the Aurora. Its petition has been dismissed, and the Busby has been held solely at fault.

The Aurora had 19 boats, all light, arranged in four tiers of 4 boats each, and a fifth tier of 3, towed on hawsers about 30 fathoms long. These hawsers ran from the stern boats to the outside corners of the outside boats of the tiers. The boats in the tow were about 100 feet long, and the entire tow was about 600 feet in length, all on hawsers 180 feet long. The tug was about 120 feet long, therefore making a total length of about 800 to 900 feet. The Aurora navigated without a helper tug, expecting to meet one at the Baltimore & Ohio Railroad bridge. The Busby was making her way from Pier 7, N. R., to Port Ivory. She left the red and black buoy on her port hand, and when 400 feet west of Livingston Point she saw the Aurora's red and green lights and showed both her own. The captain of the Aurora testified before the local inspectors that he saw a red light and towing lights, although he testified on the trial that he first saw both the Busby's side lights. Apparently he did not see her until he was fairly close, and until she was well on his port and toward Staten Island. The Aurora's lookout, who was on the bow deck, first saw the red light of the Busby.

The captain of the Busby testified that he kept going closer to Staten Island, and thus shut out the green light of the Aurora. She kept her course without change until abreast, when she hard-a-ported. When the Busby first sighted the Aurora, she was about 2,000 feet east of Livingston Point, and some 2,000 feet away from the Aurora. The Busby blew one whistle, ported her wheel, and received no answer. She then blew another whistle three seconds later and slowed her engine. These whistles were blown about three full seconds apart. At that time the tugs were showing red to red. Not hearing a response to the second signal, the Busby then hard-a-ported and worked under a

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slow bell. Under these circumstances, the Busby could not stop altogether, for to do so she would have lost control of her tow, as the outside boat was in the current and the inshore boat in slack water. This would have resulted in her shearing. The Busby did all that could be done under the circumstances in going against the tide, as she was obliged to; she went about 200 feet between the time she blew the first whistle and the time of the collision. She was well over toward the Staten Island shore. The Aurora was going with the tide and more swiftly than the Busby.

The cause of the collision, undoubtedly, was the effect of the tide in swinging the tail of the Aurora's tow toward Staten Island, but this swing could not be increased by her porting the wheel as she passed the Busby. The tow swung so far on the port side that one of the witnesses says he could see the Aurora's stern, and she was shearing a little toward Staten Island—this probably due to her porting the wheel. If the tow was following the shearing tug, the tail of the tow must have swung toward Staten Island, considering the location as given by the Aurora's witnesses of its tow; and considering the space occupied by having four barges abreast, and the fact that the Aurora's tow were light barges, it is quite apparent that the Busby then was several hundred feet off the Staten Island shore and the Aurora crowded her over into this position. The record is clear that the Busby continued to head over to the Staten Island shore, for at the time of the collision the Luna, the lighter on the starboard side of the Busby, was less than 100 feet from the Staten Island shore.

We are satisfied that the collision was due to failure to properly manage the tow of the Aurora. It was improbable that the Busby would have kept in the middle of the flood tide, when she could get slack water by keeping close to the Staten Island shore. The fault may well be predicated upon the Aurora alone, with such a long tow in tide waters in an uncontrollable state. She was obliged to keep her tow in line, and if she had not sufficient power to do this alone, it was incumbent upon her to employ helpers. The Busby went as close to the Staten Island shore as safety would permit, and we are of the opinion that she should be exonerated from fault.

The decree will therefore be reversed.

(258 Fed. 441)

ARBITMAN v. WOODSIDE et al.

(Circuit Court of Appeals, Fourth Circuit. April 17, 1919.)

No. 1673.

1. ARMY AND NAVY ⟸20—EXEMPTION BOARDS—REVIEW BY COURT.
Action of an exemption board within the scope of its authority is final, and not subject to judicial review, when the investigation has been fair and its finding is supported by substantial evidence.

2. HABEAS CORPUS ⟸16—DISCHARGE FROM MILITARY SERVICE.
On proof that investigation by an exemption board has not been fair, or that it has abused its discretion by a finding contrary to all the substantial evidence, relief should be given under writ of habeas corpus.

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3. ARMY AND NAVY ⇐20—EXEMPTION BOARDS—UNFAIR REJECTION OF CLAIMS.
Rejection by exemption board of petitioner's claim to exemption as an alien who had not declared his intention to become a citizen, his showing being prima facie sufficient, and in no way met, but being disbelieved merely because other claims for exemption had been supported by false affidavits, was arbitrary and unfair, amounting to refusal to investigate.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Habeas corpus proceeding by Samuel Arbitman against Capt. H. N. Woodside, commanding First Separate Detachment Company, 154 Depot Brigade, and the military authorities of Camp Meade, Md. Application for writ dismissed, and petitioner appeals. Reversed.

Joseph Hettleman, of Baltimore, Md., for appellant.
Samuel K. Dennis, U. S. Atty., of Baltimore, Md., for appellees.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. Appellant, Samuel Arbitman, by writ of habeas corpus applied to Judge Rose of the district of Maryland for discharge from military service at Camp Meade, alleging himself to be a citizen of Russia who had not declared his intention to become a citizen of the United States, and that the action of local exemption board No. 1 of Philadelphia in placing him in class A1, and of the district board in sustaining the classification, was arbitrary, unfair, fraudulent, and in abuse of discretion. After hearing testimony, the District Judge dismissed the application, holding that the boards had given petitioner a fair hearing, and that therefore he had no jurisdiction to review their action by habeas corpus.

[1, 2] The rule is established that the action of such executive boards within the scope of their authority is final, and not subject to judicial review, when the investigation has been fair and the finding supported by substantial evidence; but upon proof that the investigation has not been fair, or that the board has abused its discretion by a finding contrary to all the substantial evidence, relief should be given by the courts under the writ of habeas corpus. United States v. Ju Toy, 198 U. S. 253–280, 25 Sup. Ct. 644, 49 L. Ed. 1040; Lewis v. Frick, 233 U. S. 291–304, 34 Sup. Ct. 488, 58 L. Ed. 967; Tang Tun v. Edsell, 223 U. S. 673–675, 32 Sup. Ct. 359, 56 L. Ed. 606; Low Wah Suey v. Backus, 225 U. S. 466–468, 32 Sup. Ct. 734, 56 L. Ed. 1165; Angelus v. Sullivan, 246 Fed. 54, 150 C. C. A. 280; Koopowitz v. Finley (D. C.) 245 Fed. 871; In re Hutflis (D. C.) 245 Fed. 798; United States ex rel. Troiani v. Heyburn (D. C.) 245 Fed. 360; Summertime v. Local Board Div. No. 10 (D. C.) 248 Fed. 832; Ex parte Beck (D. C.) 245 Fed. 967; Wong Yee Toon v. Stump, 233 Fed. 194, 147 C. C. A. 200.

In proof of his claim to be placed in class 5 as a resident alien who had not filed his first naturalization papers, Arbitman presented to the local board his own affidavit in precise accordance with the reg-

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ulations and in the form prescribed by the Provost Marshal General, giving the date and place of his birth in Russia, the date of his immigration to this country, and stating that he had not taken out the first papers looking to naturalization; the affidavit of Samuel Portner and Isadore Portner to the same effect; a Russian passport, dated April 18, 1914, purporting to authorize him to move from place to place in Russia. On rejection of his claim to be placed in class 5 by the local board, and by the district board on review, Arbitman was taken to Camp Meade on January 3, 1918. On February 21, 1918, his attorney addressed a letter to Maj. Gen. J. E. Kuhn, in command of Camp Meade, asking for a discharge. Gen. Kuhn replied, stating that he could not review the matter, because the local board had given a full and fair hearing, and because relief had not been asked as required by the regulations within seven days after arrival at camp. The military authorities, however, apparently waived the time limit and considered the matter on the merits, for Gen. Kuhn did refer it to the adjutant general of Pennsylvania, who in turn referred it back to the local board, which refused to reconsider the case.

Petitioner's showing before the boards, made out in precise accordance with the requirements, established prima facie that he was a Russian citizen, and had taken no steps looking to naturalization. Nothing was offered tending to show that the affidavits to this effect were false, or that the passport was not genuine. The sole reason upon which the exemption was rejected was that the boards did not believe the affidavits; and the sole basis of this disbelief was the ease with which members of the board had found that such affidavits could be obtained. Nothing appeared tending to impeach the reputation or character of petitioner, or either of the other affiants, and nothing to show that any member of either board knew them to be unworthy of belief. Although the records of the immigration commissioner were open to the exemption officers, they made no effort to disprove the statement that Arbitman had not applied for naturalization papers.

[3] Under these circumstances, it seems to us that the rejection of petitioner's claim was arbitrary and unfair. It meant the refusal to investigate his claim and proofs on their own merits, merely because other claims for exemption had been supported by false affidavits. For this reason the judgment must be reversed.

This conclusion is no reflection on the character, competency, or good faith of the exemption boards of Philadelphia. The duties of the exemption boards were most onerous. The country's safety required quick decision and action on many difficult questions. These duties were discharged at great personal sacrifice, with so much ability, fidelity, and fairness, that the number of applications for judicial interference has been very small. It was inevitable that there should be an occasional slip, like that made by the boards in this case. The matter of surprise is that there were not more mistakes.

Reversed.

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(258 Fed. 444)

UNITED STATES v. FIDELITY & CASUALTY CO. OF NEW YORK (two cases).

(Circuit Court of Appeals, Third Circuit. June 18, 1919.)

Nos. 2468, 2469.

1. BAIL ⊂=75—FORFEITURE OF BOND.
Where defendants failed to appear for trial, and surety failed to produce them, their recognizances may be forfeited.

2. BAIL ⊂=79(1)—SETTING ASIDE FORFEITURE.
Under Rev. St. § 1020 (Comp. St. § 1684), authorizing court to remit recognizance forfeitures where public justice does not otherwise require, etc., the court's refusal to set aside forfeitures as to inmates of a bawdy-house near a military camp, who did not appear until a week after date set for their trial, causing inconvenience regarding witnesses, the disposition of other cases, etc., was not error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Actions by the United States against the Fidelity & Casualty Company of New York as surety for Rose Jacobson and against the same company as surety for Eva Melsker. From orders refusing to remit forfeitures of recognizances (257 Fed. 760), the surety brings error. Affirmed and remanded.

William G. Wright, of Philadelphia, Pa., for plaintiff in error.

Robert J. Sterrett, of Philadelphia, Pa., for the United States.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. These cases concern the forfeiture of recognizances given, respectively, by Rose Jacobson and Eva Melsker in the court below for their several appearances when called for trial on criminal indictments. Their cases were duly set for trial on March 10, 1918, but they both failed to appear. Thereupon the surety was duly called in open court to produce them, and having failed to do so, or show any cause for their default, the recognizances were forfeited. A number of witnesses were in attendance for the trials, in expectation of which all other cases had been postponed for hearing at later date. The result of the default was one of those delays and obstructions which cause criticisms of courts, but which in fact no court can prevent, where persons who should be in attendance fail to keep their engagements. But, while courts cannot prevent these delays, they can sometimes take a salutary course that may prevent repetition. A week later than required the defendants appeared and were tried and convicted. Thereupon the surety company petitioned the court to take off the forfeiture of the recognizances. This the court refused to do. Whereupon the surety company sought to appeal from such refusal, but the judge, asserting the taking off of the forfeiture was wholly a matter of discretion, refused to grant such attempted appeal. Thereupon the surety company sued out this writ of error, and assigned for error the refusal of the court to take off the

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forfeiture. A motion is now made to dismiss this writ of error, on the ground that the matter was one of discretion, and not the subject of review.

[1, 2] Without entering upon this question, we will, inasmuch as we have the full cases before us, assume, for present purposes, appeals would lie, and the causes are properly before us for disposition on the merits. Such being the case, has the surety company shown the court below was in error? We think not. There can be no question but that the court had the right to enter decrees of forfeiture when the defendants failed to appear and the surety failed to produce them. Such decrees having been properly entered, R. S. § 1020 (Compiled Statutes, § 1684),[1] printed in the margin, specifies the circumstances which enable a court to take off such forfeiture. Turning to that statute, we note it provides that the court "may, in its discretion, remit the whole or a part of the penalty," where "it appears to the court that there has been no willful default of the party," and "that public justice does not otherwise require the same penalty to be enforced."

Passing by the question whether the failure of the surety to produce the defendants when called for trial, and with no valid excuse for so doing, save neglect to fulfill the stipulated duty, was not in itself a willful default, we are very clear that the default was in fact one where public justice might well require the penalty should be enforced. These defendants were ones of a lot of women who were brought from New York City and installed in a bawdyhouse within the prohibited limits of a military camp. The court found "the conviction cannot be resisted that in doing what she did she was financed by, if not in fact acting for, others." The efforts of these women, many of whom were diseased, to entice the men in the camps, was open, shameless, and blazoned with effrontery. The case and the time were such as to necessitate prompt trials, so as to safeguard the young men in the camp. Not only was such prompt trial thwarted, but, as the court found, "the nonappearance of the defendants obstructed and delayed the work of the court and subjected the United States to a not inconsiderable expense, the sum total of which could not be definitely estimated." No one but the trial judge, whose court was subjected to the consequences resulting from the failure of these defendants to appear, can better determine whether public justice required that the penalty of forfeiture be enforced in these cases, and we are of opinion that, in view of all the attendant circumstances, some, but not all, of which we have referred to above, he committed no error in refusing to take off the forfeitures.

The orders refusing to take them off are therefore affirmed, and the causes remanded to the court below for further procedure.

[1] "When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

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(258 Fed. 446)

THE WESTMEATH.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 25.

CONSTITUTIONAL LAW ⟸275(2)—SEAMEN ⟸1—SEAMEN'S ACT—CONSTITUTIONALITY.

Seamen's Act March 4, 1915, § 4 (Comp. St. § 8322), requiring payment to seamen on demand of half wages earned at every port where the vessel shall load or deliver cargo, as applied to foreign seamen on foreign vessels entering American ports, although subversive of their contracts, is constitutional.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit by Peter Lucas and Gustav Blixt against the steamship Westmeath; J. M. Thompson, claimant. Decree for libelants, and claimant appeals. Affirmed.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter, John M. Woolsey, and Peyton Randolph Harris, all of New York City, of counsel), for appellant.

Silas B. Axtell, of New York City, for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. The legal ground-work of this action is identical with that of The Italier, 257 Fed. 712, 168 C. C. A. 662 (opinion filed herewith).

At a port in Australia and in December, 1915, libelants shipped as members of the crew of the British steamer Westmeath for a voyage "not to exceed one year." Before that year expired the Westmeath arrived in the harbor of New York, where she loaded and discharged, and there the libelants aver they made demand for half wages under R. S. § 4530, as amended (Comp. St. § 8322). This demand was refused, whereupon this action was brought for full wages, etc.

The libelants had decree below, and as to the facts it is sufficient to say that the single defense (of desertion) set up in the answer is not proved. On the contrary, we agree with the District Judge that libelants' case was proved within the statute.

To grant this decree in favor of foreign seamen against a foreign vessel solely because such vessel, by coming into the harbor of New York and there loading and discharging, gave to her crew rights entirely contravening those secured or granted to that crew by British law, is now asserted to be such an interpretation of the Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1165 (Comp. St. § 8322), as to render Rev. St. § 4530, as amended, unconstitutional.

That the statute impairs, or rather abrogates, the foreign seaman's shipping contract, is admitted; but we know of no reason why Congress, if so minded, may not pass such a statute. "It is no answer (to a plain congressional declaration) to say that it interferes with the validity of contracts, for no provision of the constitution prohibits Con-

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gress from doing this, as it does the states." Mitchell v. Clark, 110 U. S. 643, 4 Sup. Ct. 170, 28 L. Ed. 279.

It is, however, urged that any interpretation of the act which enables a seaman on a foreign ship to accomplish that which is embodied in the decree appealed from, is violative of the Fifth Amendment, in that it interferes "with the liberty to contract on such terms as may be advisable to the parties to the contract," and is therefore "a deprivation, of liberty without due process of law," and for this reliance is placed upon Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. In our opinion this very contention was in substance made in Patterson v. The Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, and there disposed of; and this decision was recently approved in The Talus, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200 (December 23, 1918).

The employment and discharge, treatment, status, and punishment of merchant seamen has long been a part of the regulation of water-borne commerce. With the advisability or expediency of declaring all seamen, irrespective of nationality, to have a status, or be entitled to treatment when within a harbor of the United States totally differing from the treatment or status accorded them in every other part of the world, we have no concern, but entertain no doubt of the power of Congress to enact this statute as a commercial regulation.

Decree affirmed, with costs.

(258 Fed. 447)

ILLINOIS CENT. R. CO. v. BEAVERS.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1919.)

No. 3365.

NEGLIGENCE ⇐142—FINDINGS—CONSTRUCTION.

A finding by a jury of wanton negligence necessarily involves a finding of simple negligence.

Pardee, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action by Pauline Beavers against Illinois Central Railroad Co. Judgment for plaintiff and defendant brings error. Affirmed.

Augustus Benners, Borden Burr, and James Rice, all of Birmingham, Ala., for plaintiff in error.

Luke P. Hunt and C. C. Nesmith, both of Birmingham, Ala., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. The court submitted to the jury the issues of simple negligence and of wanton negligence upon the part of the defendant. A general verdict for plaintiff was returned. The evi-

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dence is such that a verdict for plaintiff, based upon wanton negligence, would properly be set aside. A finding, however, by the jury of wanton negligence, necessarily involves a finding of simple negligence —the one including the other.

The jury having found simple negligence, either upon the issue of simple negligence or in their finding upon wanton negligence, and there being evidence to sustain a finding of simple negligence, and there being no evidence which would justify a finding that plaintiff was guilty of contributory negligence, the judgment is affirmed.

PARDEE, Circuit Judge (dissenting). On a careful examination of all the evidence submitted by the plaintiff on the trial below, I find none sufficient to warrant the submission to the jury of the issue of simple negligence on the part of the railroad company or any of its employés. However, over the objections of the defendant below, the trial judge did submit to the jury in an involved charge the question of wanton negligence, and that error was sufficient to mislead and prejudice the jury in determining the questions of simple, wanton, and contributory negligence involved in the case; and I doubt whether we are authorized to assume that the jury based their verdict wholly upon the evidence submitted under the first count of the complaint.

(258 Fed. 448)

SILVER & CO., Inc., v. S. STERNAU & CO., Inc. (two cases).

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

Nos. 203, 204.

1. PATENTS ⊜328—INFRINGEMENT—COLLAPSIBLE STOVE.
The Ferdon patent, No. 1,199,257, for a collapsible stove, is limited to the particular means shown for keeping the legs in open position when in use, and, as so construed, *held* not infringed.

2. PATENTS ⊜226—INFRINGEMENT—PRACTICAL IDENTITY.
Infringement should not be determined by the mere decision that the terms of a claim of a valid patent are applicable to defendant's device, but the question involves considerations of practical utility and substantial identity, and that must be quantitative as well as qualitative.

3. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—COLLAPSIBLE STOVE.
The Ferdon patent, No. 1,229,432, for a collapsible or knock-down stove, *held* void for lack of invention, and also not infringed.

Appeals from the District Court of the United States for the Southern District of New York.

Two suits in equity by Silver & Co., Incorporated, against S. Sternau & Co., Incorporated. Decrees for defendant, and complainant appeals. Affirmed.

Stephen J. Cox, of New York City, for appellant.

John Robert Taylor, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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MANTON, Circuit Judge. Both suits between the litigants were tried together in the lower court and are presented here in a single record upon this appeal. Both will be treated in one opinion.

The first action is based upon patent No. 1,199,257, issued September 26, 1916, to the appellant's assignor. The second action involves the alleged infringement of patent No. 1,229,432, issued June 12, 1917. Both patents were issued to Guy W. Ferdon. The appellant refers to the first as a kitchenette patent and the second as a collapsible stove. Each patent, however, refers to the invention as a collapsible stove.

Claim 1 alone is involved in action No. 1, while claims 7, 8, and 9 are involved in action No. 2. After the trial, the District Judge dismissed the suit on the first patent on the ground that infringement was not established. In the action for infringement upon the second patent, the patent was held void for lack of invention.

[1] Claim 1, of patent No. 1,199,257 reads as follows:

"In a support for heaters, in combination, a hot plate, legs hinged to the underside of said plate, and adapted to be folded against said plate, means adapted to fold against said legs for keeping said legs in open position, and means when the device is in use, for supporting heating devices in proper relation to said hot plate."

The inventor says that his invention relates to collapsible stoves or heaters, and particularly to a device to be used for cooking with alcohol lamps, whether the lamps be those which use solid or liquid alcohol. He does not restrict his device to the use of this particular fuel, and says that lamps supplied with other solid liquid or gaseous fluid may be employed in connection with the device. He refers to his invention in his specification as a folding stove of the kind that can be folded into a small package and carried about in an automobile kit by hand or as an article of luggage, which may be instantly set up for picnic or other cooking. It is quite apparent, from this record, that the recent increase in the use of solid alcohol for cooking purposes, a field which has been entered extensively by the parties to this litigation, gave rise to the need for small folding stoves. The idea of collapsibility at the date of the issuance of this patent was very generally resorted to in the cases of articles for transient use, such as card tables, ironing boards, folding beds, and folding chairs, and articles and structures in which it was sought to secure compactness of bulk. Other collapsible articles were dining room tables, pianos, bureaus, and bedsteads. This record demonstrates that in the stove art the structures have been made to collapse for use in camping or for motoring, the idea being to provide for collapsing or knocking down to reduce the bulk in transportation. Examples of such collapsibility are found in the prior art in the patents issued to Cook, Morawetz, Swinney, and Pjerron.

This patent discloses a structure comprised of two separate and distinct parts, the stove proper, which may be folded, and the shelf, which is separate therefrom, and which cannot, in any sense, be said to be foldable. It comprises a hot plate, made of thin sheet metal and provided with openings and grates of the usual type. The hot plate is bent or turned around its edges for the purpose of connecting a wire

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to form a stiffening flange. To the underside of the hot plate is attached, at each of the four corners, a wire eyelet. Connected to each of these wire eyelets is a piece of wire so bent as to produce a number of wire legs at opposite ends of the hot plate and formed with a wire link or reach connecting each pair of legs. The wire link is bent upwardly, so as to form a ledge or rest for the separate sheet metal lamp-supporting shelf, which may be placed and used for holding the heating devices it is desired to utilize. To each of the four legs is pivotally attached a wire bracket formed of a single piece of wire. The two wire brackets at each end of the structure may be folded against the wire legs to which they are pivotally connected. The brackets and legs can be folded inwardly upon the underside of the hot plate. When setting the stove up, the legs are opened outwardly, the brackets are extended, and then the brackets are forced into engagement with clips or locks formed on the underside of the hot plate, midway of its length, for the purpose of bracing the structure to give stiffness and rigidity to the legs and to support the hot plate. The shelf is then rested in a position upon the connecting wire links extending between the pair of legs located at each end of the hot plate, and is firmly held there. The specifications provided that, when folded, the shelf is removed and laid alongside the parts folded together. The wind shield, a separate part, is often sold commercially with the appellant's device.

In the original claim in the Patent Office, as the structural element, it was not provided for "means adapted to fold against said legs for keeping said legs in an open position," but it was provided as "means for keeping said legs in open position." The Patent Office, granting the patent, however, allowed the claim as "means adapted to fold against said legs for keeping said legs in open position."

In the defendant's device, the means for keeping the legs in open position are not adapted to fold against the legs, but to fold against the top plates, to which they are hinged. When folded, they do not rest against the legs, but are placed in close position side by side to the legs, making a compact heater, and thus saving space in transportation. Appellant's specifications do not describe or illustrate any means for keeping the legs in open position which are adapted to fold against said legs. The brackets, which are adapted to fold against the legs, and which are intended to constitute the "means" provided in claim 1, do not, of themselves, perform the function of keeping the legs in open position. It is only when these brackets are swung into position beneath the clips or lock, and there held pinched against the underside of the hot plate, that sufficient rigidity is afforded to keep the legs stiff and in open position. The clips or lock device is the essential feature of the structure, in co-operation with the brackets, to keep the legs in open position. They are not adapted to fold against said legs. The shelf cannot be considered the means for giving rigidity to the legs. According to the specifications, it serves another purpose.

In the claim as originally filed in the Patent Office there was cited against the appellant the British patent, No. 13,312, A. D. 1912, to

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Irving and Anderson. This disclosed a hot plate, legs hinged to the underside of the plate and adapted to fold against the plate, and means when the device is in use for supporting heating devices in proper relation to said hot plate. The only difference between the claim of the patent in suit and the British patent resides in the means adapted to fold against said legs and keeping said legs in open position. The heating device in the Irving patent acts as a support for the heating apparatus and keeps the legs in open position. We think that the Ferdon invention is limited to a particular form or kind of means adapted to fold against said legs for keeping said legs in open position.

In view of the state of the art, particularly the Irving and Anderson patent, the appellant's claim must be read with no range of equivalents, at least such as would be permitted if defendant's structure was held to be an infringement. The defendant manufactures a folding kitchenette, having a wind shield and shelf integrally constructed therewith, and having no separate parts of any kind. It is made of sheet metal, and no wires are employed in its construction. It has the hot plate, with the necessary openings. The top plate is supported by three sheet metal sides, comprising two end supports and a side support. The end supports, beside constituting a wind shield, act as legs. The wind shield is provided with a horizontally disposed sheet metal shelf, provided with two openings which, when the device is assembled, are positioned beneath and in line with the openings on the top plate. In order to prevent the legs of the stove from collapsing, it is necessary to lock them against longitudinal movement. It has no means which are adapted to fold against the legs for keeping said legs in open position. It does have a wind shield hinged to the top plate and adapted to fold against the under side of the top plate. The wind shield does not keep the legs or supports in open position. The legs or supports are kept in open position by co-operation of a key upon the outside of each with the end supports, which engage with a tenon passing through a keyhole located in each of the end supports; tenons being formed on the ends of a centering shelf, which is hinged upon the wind shield to keep the legs open and the device in operative position.

[2] Appellee's structure requires the co-operative action, therefore, of these different elements. Infringement should not be determined by a mere decision that the terms of a claim of a valid patent are applicable to the defendant's device. The question of infringement involves considerations of practical utility and substantial identity and that must be quantitative as well as qualitative. Edison Co. v. American Mutoscope & Biograph Co., 151 Fed. 769, 81 C. C. A. 391; Goodyear Co. v. Spalding (C. C.) 101 Fed. 990.

We think the District Judge very properly held that there was no infringement. The decree in this action is affirmed.

[3] In the second action, involving suit for infringement of patent No. 1,229,492, the appellant contends that this is in the nature of an improvement on the device of the first patent. It appears, however to be an entirely different type of structure from the defendant's kitchenette.

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The device made pursuant to this patent would appear to be a permanent liquid stove or range, such as might be used as a permanent fixture in a kitchen. Ease of collapsibility is not important in a stove of such character or for such use. It is collapsible in the sense that it might be said to be of the knock-down type, so as to be readily shipped or transported by the manufacturer or in moving from house to house. The specification says:

"The object of the invention is to provide an oil stove of the usual blue flame kind which can be shipped knock-down."

It consists of four parts, a stand or table, a drip pan, reservoir for the oil, and the stove proper. The stand or table consists of two bars extending lengthwise, to which are connected at the end a pair of braced legs; the legs being adapted to fold down upon the connecting bars. The top of these legs are provided with feet upon which the legs, forming part of the stove proper, which constitutes the separate part of the structure, are adapted to rest. The stove legs are provided with corresponding feet, and these two parts of the apparatus, the stove and the table, are fastened together with bolts and nut connection through the holes in the feet and the other respective parts. The drip pan is located below the top plate and secured to the legs by bolts and nuts. In disassembling the parts, it is necessary to remove the bolts and nuts which serve the means of connecting the stand or table of the stove.

While this structure may be termed a knock-down one, it is not in any sense a folding structure; the only folding or collapsible parts being the legs of the stove and the legs of the stand. Constructing a knock-down stove under claims 7, 8, and 9 of this patent presents no novelty or invention. Such construction was well known to the prior art. The appellant shows in its patent, heretofore considered, the hinging of the top plate. It is also shown in the Irving and Anderson patent, No. 13,312, A. D. 1910. There is nothing to indicate any commercial success because of this method of assembling parts of a stove.

We think that as to this patent in suit there is neither infringement nor even invention.

Decree affirmed.

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(258 Fed. 529)

UNITED STATES v. MOYNIHAN.

(Circuit Court of Appeals, Third Circuit. July 7, 1919.)

No. 2460.

1. LARCENY ⟸1—INTERSTATE COMMERCE.
In a prosecution for violating Act Feb. 13, 1913 (Comp. St. §§ 8606, 8604), making it a crime to steal, or unlawfully take, carry away, or conceal, etc., any goods or chattels moving as part of an interstate or foreign shipment, etc., the statute will be construed to apply to the case of a shipment from one point in the state to another point, where the route is in part without the state.

2. LARCENY ⟸55—INTERSTATE COMMERCE—EVIDENCE.
In a prosecution under Act Feb. 13, 1913 (Comp. St. §§ 8606, 8604), denouncing the offense of stealing, or unlawfully taking, carrying away, or concealing, or by fraud or deception obtaining from any railroad car, station house, or platform, depot, steamboat, vessel, or wharf, any goods or chattels moving as an interstate or foreign shipment, etc., where it appeared that a bale of silk was pushed from an express wagon, and it was claimed defendant attempted to place the silk in an automobile, etc., evidence *held* insufficient to show that the silk was stolen from any platform, etc.

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Edward Moynihan was convicted of violating Act Feb. 13, 1913, making it a crime to steal or unlawfully carry away or conceal, or by fraud or deceit obtain from any railroad car, etc., any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment, and he brings error. Reversed and new trial granted.

George E. Cutley and Thomas F. A. Griffin, both of Jersey City, N. J., for plaintiff in error.

Charles F. Lynch, U. S. Atty., and Samuel I. Kessler, Asst. U. S. Atty., both of Newark, N. J.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. On September 6, 1918, the firm of John Dunlop's Sons, at their place of business in New York city, delivered to the American Express Company a bale of silk for express carriage to their factory at Spring Valley, New York state. Spring Valley was a station of the Erie Railroad and no other railroad reached it. Having no other possible routing except by the Erie Railroad, and as that road could only be reached at its terminus in Jersey City, the express company routed the package over that road, and took it to its dumping station in New York City, preparatory to sending it by ferry to New Jersey. The proof showed the package was duly accepted and receipted for by the express company, and was delivered at the dumping station on that day. The next testimony as to the package is that on the same evening the attention of a policeman was attracted to an express wagon passing along a Jer-

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sey City street, and a package, which proved to be this bale of silk, was being pushed by a pair of hands from the tailboard of the wagon. The officer was unable to see any part of the person who pushed it except his hands. This pushing out of the bale was evidently part of a concerted plan, for as it was done an automobile in which were two men approached the express wagon. One of the men jumped out, grasped the bale of silk which was being pushed out, took it in his arms, and tried to put it into the auto. He failed in the effort, dropped the bale, and both he and the man in the auto started to escape, the man who dropped the bale running up the street, and the man in the auto driving away in the car. The latter escaped. The policeman called on a soldier who was standing by to guard the bale, and himself ran after the fleeing thief, firing two shots as he pursued him. Others joined in the chase, and two men finally captured the fugitive and delivered him to the officer. He identified him as the man who had alighted from the automobile and had taken the bale of silk from the tailboard of the express wagon. The man proved to be Edward Moynihan, the defendant. In pursuance of the act of Congress of Feburary 13, 1913, c. 50, 37 Stat. 670 (Comp. St. §§ 8603, 8604), which makes it a crime to "steal or unlawfully take, carry away or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use, any goods or chattels moving as, or which are a part of, or which constitute, an interstate or foreign shipment of freight or express, or shall buy, or receive, or have in his possession any such goods or chattels, knowing the same to have been stolen," Moynihan was indicted for having in possession goods stolen from an interstate shipment, and pleaded not guilty.

Under the charge of the court, four distinct questions of fact, inter alia, were submitted to the jury as essential to be found before the defendant could be convicted: First, "that the bale was an interstate, or part of an interstate, shipment," and in determining that fact the truth of the evidence "that the only route by which shipments may be made by express from New York City, N. Y., to Spring Valley, N. Y., was by the Erie Railroad, which runs from New York City, in the state of New York, over to Jersey City, in the state of New Jersey, and then back from the state of New Jersey into the state of New York," was submitted to the jury's consideration. The second question submitted was whether the bale of silk was stolen from a platform or depot of the American Express Company in New York City. The third question was whether Moynihan had the bale of silk in his possession. The fourth was whether, if Moynihan had the bale in his possession, he knew it was stolen. In view of these exact instructions, we must accept the verdict of guilty as establishing as facts these several essential elements of the crime, if there was evidence before the jury from which they might so find. After sentence of imprisonment, Moynihan sued out this writ, and the first substantial question here involved is whether, under the facts proven and the inferences and findings the jury drew therefrom, Moynihan was guilty of violating the statute in question.

[1] The determination of that question depends on whether the

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bale of silk which Moynihan, and those confederating with him, were endeavoring to steal, was included under the broad term, "any goods or chattels moving as, or which are a part of, or which constitute an interstate * * * shipment of * * * express." That the bale of silk constituted "goods and chattels" is a fact; that they were moving as and constituted a shipment of express is equally undeniable; and that the express company could only carry them to destination by taking the bale from its own dock in New York state and delivering it to a railroad's own cars at its terminus in New Jersey is also certain. Such being the unquestioned facts, it follows that the bale of silk was actually moving as an interstate shipment, and was the class of commerce Congress had power to protect from depredation in transit. It follows, therefore, that Moynihan's crime was punishable under the statute, unless we are to hold that, notwithstanding the facts found, this court shall hold that because the bale of silk started from, and was to be delivered to, points in New York state, the bale was thereby so theoretically fixed as an intrastate shipment that its compulsory interstate routings between those intrastate points did not confer an interstate character as it moved over this compulsory interstate route.

To give this act, in its application to the particular case before us, the narrow construction here contended for, would result in such disastrous consequences to the safety of goods moving on many interstate routes over the country between shipping and delivery points situate in the same state as may well cause us to hesitate. Take, for example, a single instance in this circuit; the great traffic, by freight and express, carried over the Baltimore & Ohio System between Philadelphia and Pittsburgh. Both termini are in the state of Pennsylvania, but the routing is through Delaware, Maryland, and West Virginia. In such interstate transit, shipments between these two Pennsylvania terminals, during their movement through these other states, remain in terminal yards, may be transhipped, are handled by many employés, and are, by reason of moving through such other states, in need of that protection which the federal government can alone afford to shipments passing outside the borders of a state. Although the shipment and delivery points of this particular traffic are both in Pennsylvania, yet, by reason of its necessarily interstate movement between those intrastate points, Pennsylvania is unable to protect such commerce, and for such interstate protection the interstate powers of the federal government are absolutely necessary.

Now, over Moynihan's crime, committed, as it was, wholly in New Jersey, New York could have no jurisdiction. And in the country at large there must be a great many like instances of necessarily like interstate routings between intrastate points, in the minds of Congress when this statute was passed. That Congress meant, in the broad terms it used, "goods or chattels moving as, or which are a part of, or which constitute an interstate * * * shipment of freight or express," to exclude from federal jurisdiction and federal interstate protection the vast volume of freight and express thus moving between terminal points in a single state, but by routings through other states, is simply unbelievable.

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In reaching the conclusion we have, we deem it proper to say that we have not overlooked the several cases cited to us. Some of them bear on taxation and other subjects than the one single one we have here before us, viz. the protection of goods moving on interstate routes. We have therefore not discussed them, and limit ourselves to saying that, within the meaning of the statute, the views expressed by us find support in the simple, common-sense statement of Judge Holt in United States v. Delaware Co. (C. C.) 152 Fed. 271: "There is a possibility of some discrimination under any theory, but I think that the simplest theory is that as soon as merchandise is carried from one state to another it becomes interstate commerce." We accordingly hold that the statute applied to the facts in this case, so far as the interstate character of the shipment is concerned.

[2] On another phase of the case, however, we think that the proof has failed to establish, with the degree of certainty required in criminal cases, one of the jurisdictional prerequisites of the statute and necessary allegations of the indictment. It will be observed from the before-quoted provision of the statute that, so far as goods constituting an interstate or foreign shipment of freight or express are concerned, it is limited in its application to thefts from certain designated places. In obedience to this requirement, the indictment alleged that the bale of silk in question had been stolen from a platform or depot of the Twenty-Sixth street terminal of the American Express Company in New York City. That the proofs were insufficient to warrant the jury in finding that this allegation of the indictment had been substantiated was appropriately raised at the close of the testimony by motion for a direction of verdict of acquittal, and error assigned on the refusal of the trial court to grant the motion.

Whether the bale of silk had been stolen from the platform in New York, as alleged in the indictment, whether it had been stolen from a platform or depot in Jersey City, or from an express wagon, or whether it was still lawfully in the possession of some employé of the express company when it was pushed from the back of an express company wagon and taken possession of by Moynihan, the evidence does not disclose. The facts and circumstances are quite as susceptible, if, indeed, not more so, of the inference that the bale of silk was being stolen by Moynihan and a confederate on the express wagon as they were of the inference that it had been previously stolen from the platform in New York or some intermediate place. The jury were permitted, therefore, merely to guess as to whether one of the essential elements necessary to justify a conviction had been established, without substantial evidence upon which to base an affirmative answer. We are therefore of opinion that it was error to have declined to direct a verdict of acquittal upon the ground just discussed.

Upon another trial it should not be, we apprehend, difficult for the government to prove, by reference to the express company records, whether or not the bale of silk had lawfully left the platform of the express company in New York City, as alleged in the indictment. If it was not lawfully taken from that platform, that fact would be an

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important item of evidence to establish the ultimate fact that it had been stolen from the platform in New York, as alleged in the indictment.

The judgment below is therefore reversed and a new trial granted.

(258 Fed. 533)

CARBON STEEL CO. v. LEWELLYN, Collector of Internal Revenue. WORTH BROS. CO. v. LEDERER, Collector of Internal Revenue. LEWELLYN, Collector of Internal Revenue, v. FORGED STEEL WHEEL CO.*

(Circuit Court of Appeals, Third Circuit. June 9, 1919.)

Nos. 2438, 2465, 2462.

1. INTERNAL REVENUE ⟸4—STATUTE—CONSTRUCTION—PURPOSE.
In construing Act Sept. 8, 1916, tit. 3, § 301 (Comp. St. § 6336¼b), the court must put himself in the position of Congress when it enacted the law, and from the circumstances and surroundings then existing, and the general purpose then in view, ascertain what was meant to be done.

2. INTERNAL REVENUE ⟸11—TAXATION OF AMMUNITION MANUFACTURERS.
The broad general purpose of Act Sept. 8, 1916, was to include in the field of taxation all such specified articles or parts thereof as were either made for war purposes, or were withdrawn from the general field of commerce and used for the making of war articles.

3. INTERNAL REVENUE ⟸9—"MANUFACTURING SHELLS"—PERSONS SUBJECT TO TAX—"MAKING."
A steel company, contracting to deliver shells to a foreign government, which manufactured in its own plant bars for which shells were made, and turned them over to subcontractors for completion, retaining ownership and control of the work, and afterwards delivering shells under its contract, realizing a net profit, was "manufacturing shells," and therefore subject to the tax imposed by Act Sept. 8, 1916, "making" being manufacturing.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Making.]

4. INTERNAL REVENUE ⟸9—"A PERSON MANUFACTURING SHELLS * * * OR ANY PART OF ANY OF THE ARTICLES MENTIONED."
A company which contracted with another company, having a contract with a foreign government, to sell and deliver high explosive shells, to furnish the steel, and complete six of the initial steps, representing about 40 per cent. of cost of shells, *held* "a person manufacturing * * * shells * * * or any part of any of the articles mentioned," and to be subject to the tax imposed by Act Sept. 8, 1916.

5. INTERNAL REVENUE ⟸9—MANUFACTURING MUNITIONS—"A PERSON MANUFACTURING SHELLS * * * OR ANY PART."
A subcontractor which agreed with contractor, having contract with a foreign government to supply high explosive shells, to furnish to contractor rough steel shell forgings, and which to fulfill its contract made, had made, or bought in the market steel required, *held* "a person manufacturing * * * shells * * * or any part," thereof and to be subject to the tax imposed by Act Sept. 8, 1916.

No. 2438:

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

No. 2465:

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari granted 250 U. S. 657, 40 Sup. Ct. 15, 64 L. Ed. —.

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In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

No. 2462:

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Actions by the Carbon Steel Company against C. G. Lewellyn, Collector of Internal Revenue for the Twenty-Seventh District of Pennsylvania, by the Worth Bros. Company against E. Lederer, Collector of Internal Revenue for the First District of Pennsylvania, and by the Forged Steel Wheel Company against C. G. Lewellyn, Collector of Internal Revenue for the Twenty-Third District of Pennsylvania. Judgment for defendants in the first two cases, and against defendant in the third case (255 Fed. 364), and the Carbon Steel Company, the Worth Bros. Company, and C. G. Lewellyn bring error. Judgment in the first two cases affirmed, and judgment in the third case reversed.

In No. 2438:

H. V. Blaxter, of Pittsburgh, Pa., and F. DeC. Faust, of Washington, D. C., for plaintiff in error.

R. L. Crawford, U. S. Atty., and B. B. McGinnis, Sp. Asst. U. S. Atty., both of Pittsburgh, Pa., and William L. Frierson, of Washington, D. C., for defendant in error.

In No. 2465:

A. H. Wintersteen, of Philadelphia, Pa., for plaintiff in error.

William L. Frierson, of Washington, D. C., for defendant in error.

In No. 2462:

William L. Frierson, of Washington, D. C., for plaintiff in error.

George B. Gordon, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

BUFFINGTON, Circuit Judge. These cases concern the construction and application of section 301 of title 3 of the act of Congress of September 8, 1916, 39 St. 756, 780 (Comp. St. § 6336¼b), which provides:

"That every person manufacturing * * * projectiles, shells, * * * or (if) any part of any of the articles mentioned in (b), (c), (d), or (e) shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

An examination of the whole act shows it imposes an excise tax on persons manufacturing either certain mentioned war munitions or appliances, or on persons manufacturing any part of any of the said mentioned articles. Therefore two questions naturally arise: First, who shall be deemed manufacturers of the mentioned articles; and, second, who shall be deemed manufacturers of any part of the articles mentioned.

[1] In ascertaining the true construction of the law, and thus carrying out its purpose, this court must necessarily put itself in the position of Congress when it enacted the law, and from the circumstances

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and surroundings then existing, and the general purpose then in view, seek to ascertain, from what was meant to be done, how best to construe and apply what was done. When Congress took up this matter the situation was that during the two preceding years of the World War great quantities of war munitions and war accessories had been manufactured in this country, and sold to the Allied governments at high and abnormal prices, owing to the fact they were abnormal products, and the call for them was imperative and instant. It was therefore felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation. That the tax was abnormal and its imposition temporary was evidenced by the provision:

"(2) This section shall cease to be of effect at the end of one year after the termination of the present European war, which shall be evidenced by the proclamation of the President of the United States declaring such war to have ended."

In addition to the feeling that these war supplies manufactured here and sent abroad were proper subjects of temporary taxation, there were other motives which led to the passage of this statute, namely, the pacifist spirit which urged embargo legislation to prevent the exportation of war supplies to belligerents, and the pro-German spirit which asserted the furnishing of war munitions to the Allies was an unneutral act. It will thus be seen that, whatever may have been the impelling motive of individual legislators, the fact is that all united in a common purpose to include the whole subject of war munitions and war accessories in a common class. And since all that were thus sent abroad were manufactured here, indeed the act is expressly directed to "such articles manufactured within the United States," and the profits made from such manufacture were the gauge of the taxation imposed, it is clear that the means Congress used to bring the whole subject-matter of war munitions and war accessories within the sphere of taxation was to take these goods as they were manufactured, and to impose an excise tax on the person who manufactured such articles, or "any part of any of the articles mentioned," and to fix such tax by "the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." Such being the case, it follows that the pertinent subjects of inquiry where the act is to be applied is, first, to ascertain whether the war munitions or war accessories were articles "manufactured within the United States"; second, if they were so manufactured within the United States, who manufactured such article, and, if so, what were the "net profits actually received or accrued * * * from the sale or disposition of such articles"; third, if they were so manufactured within the United States, who manufactured any part of such article, and, if so, what were the "net profits actually received or accrued * * * from the sale or disposition of such articles."

In thus applying the broad, inclusive terms of the statute, "every person manufacturing * * * shells * * * or any part of any of the articles mentioned," along the lines of inquiry above indicated, it is clear that it must have been in the mind of Congress that complex questions would arise in specific cases, and that these difficulties of spe-

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cific application must be solved on some general principles of the act. Turning to the act, we think the broad purpose of Congress is clear to select, as the subject of taxation, war munitions and war appliances, for each of the enumerated articles is such as can be used for war. At the same time it must have been foreseen that many of these articles could also be used for the normal needs of commerce, and those who made them for such normal use were not making abnormal profits. So, also, the articles that in their completed, unitary form were adapted solely for war purposes might have parts which, in and by themselves, could be also used, and would naturally be used, for the normal purposes of commerce. In view of such recognized facts, was it the purpose of Congress to tax the manufacture of such articles, or parts thereof, which, while susceptible of warlike use, were, in point of fact, not so used, but remained in the channels of normal commerce and use? Clearly not; first, because such articles, or parts of articles, when sold in ordinary commerce, did not earn war profits; and, second, because the general purpose of the act not to subject the ordinary normal commerce of the country to this abnormal temporary war tax is manifested even in such warlike agencies as gunpowder, explosives, caps, and the like, by the act providing that such of said articles as are "used for industrial purposes" are excepted.

[2] It would therefore seem that the broad general purpose was to include in the field of taxation all such specified articles or parts thereof as were either made for war purposes or as were withdrawn from the general field of commerce and used for the making of war articles.

Applying these general principles and lines of construction to the act, and in its application to the individual cases arising under it, let us turn to the facts of the three cases here involved, viz.: Carbon Steel Co. v. Lewellyn, Collector; Worth Bros. Co. v. Lederer, Collector; and Lewellyn, Collector, v. Forged Steel Wheel Co.

In the first case it appears the Carbon Steel Company made three substantially similar contracts with the British government, whereby in one contract it agreed "to manufacture 75,000 4.5" shells lyddite, * * * suitably packed for export, and delivered free alongside steamer New York. * * * Inspection will be carried out at contractor's works by an inspector or inspectors appointed by the Secretary of State."

In a second contract the steel company contracted to sell, and the British government to buy, 425,000 shells. The contract provided that in case of—

"the seller being able to manufacture from its present plants more than 425,000 of the said shells before June 30, 1916, the buyer will accept and pay for any such additional shells up to 175,000."

Payment was to be made on—

"invoices and certificates of inspection, executed by an inspector of the buyer, certifying that such shells have been manufactured and have passed all factory inspection and shop tests with respect thereof. * * * It is understood and agreed that the buyer shall have the right of having one or more inspectors at each of the factories where the shells hereby contracted for, and their component parts, are being manufactured, for the purpose of observing

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the manufacture thereof, and of testing the same at any time before delivery, and that the seller or its subcontractors shall furnish all facilities required by such inspector for this purpose. The seller at its expense shall furnish all gauges, including master gauges, to be used in connection with the manufacture of the shells hereby contracted for, and their component parts, including all gauges required by the inspectors of the buyer."

The third contract was substantially of like import.

[3] From the contracts it will be seen that the general purpose of the Carbon Steel Company was to make, or have made—and making is manufacturing—and to deliver in the United States shells contemplated by the act.

In carrying out the contracts the shells were made in the United States; they were accepted by the British government, and the contract price was paid therefor by the government to the Steel Company; and, as a result, there accrued to the Steel Company "net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." Such being the fact, it would seem the case falls within the general scope of the act, unless the Steel Company can show that in the manufacture of the shells it contracted to have manufactured it did not manufacture the shell as a whole or any part thereof. Is such the fact?

Now, what was done in this case was this: The making of a shell consisted of nine operations, as follows:

"(1) Obtaining suitable steel in bar form;
"(2) Cutting or breaking said steel bars to proper length;
"(3) Converting said cut bars or slugs into a hollow shell forging by means of a hydraulic press;
"(4) The turning of said shell upon a lathe to exact dimensions;
"(5) Closing in one end of said forging to form the nose of the shell;
"(6) Drilling out the case of said shell and the inserting of a base plate;
"(7) Threading of the nose of the shell, and the insertion of the nose bushing, and the insertion in said nose bushing of a wooden plug to protect the thread thereof;
"(8) Cutting a groove around the circumference of said shell, and the insertion therein of a copper driving band, and the turning of said band to required dimensions;
"(9) Varnishing, greasing, and crating of the completed shell."

But when all is said and done, it is clear that the basic operation of shell manufacture was making steel of certain characteristics, for all later steps depended on the composition and characteristics of the steel made in this initial step. This foundation step the Steel Company effected in its own plant, and the relative importance of this first step, compared with the remaining eight, is shown by the fact that the bare material and running expenses involved in this step amounted to somewhat over $2,000,000 as compared with some $4,300,000 paid to subcontractors as their expenditures for work, material, and profits in the other eight steps. The steel thus made in the first step was the property of the Steel Company, it remained its property while the subcontractors completed the other eight steps, then was finally transferred by the Steel Company to the British government. Moreover, during such eight steps every operation of these subcontractors on the original steel was followed up by employés of the Steel Company, who checked

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the work as it progressed, and by virtue of the contracts to which we have referred it was subjected to the inspection of the British government provided for in the contract. It will thus appear that every step involved in the manufacture of the shell, from the raw product to the finished shell, was either done by the Steel Company itself or by those whom it hired to do some part thereof, and that the original steel base never passed out of the control and direction and ownership of the Carbon Steel Company.

To us it is clear that if the law here involved were a draft or conscription law, and that from its operation there was exempted from draft "every person manufacturing * * * shells * * * or any part of the articles mentioned," that all the workmen of the Steel Company engaged in making shells here involved would fall within said exception, because they—and therefore the company—were manufacturing shells. We therefore conclude that by virtue of the Steel Company's own work in the first step, and by virtue of its effecting and controlling the other eight steps through its subagents, the Steel Company was manufacturing shells, and therefore subject to the tax imposed by this statute. It follows that the judgment of the court below, which was that the Steel Company could not recover from the government the tax it had paid, must be affirmed.

[4] In the case of Worth Bros. Co. v. Lederer, Collector, coming from the Eastern District of Pennsylvania, the pertinent facts are: The Midvale Steel Company and Worth Bros. Company are corelated to each other, in that both companies are owned by the Midvale Steel & Ordnance Company. The Midvale Steel Company contracted with the French government to sell and deliver about 400,000 high explosive shells, to be made under accompanying specifications, and under inspection of the government as the work progressed. The said company was equipped to completely manufacture shells, and in fact did, at its own plants, so completely manufacture large quantities of the shells thus contracted for. Later it contracted with Worth Bros. Company to furnish the steel and complete six of the initial processes of the shell-making, which six steps constituted about 40 per cent. of the cost of the shells. Thereafter the remaining 29 steps of the shell-making process, and which constituted 60 per cent. of the cost, was done by the Midvale Steel Company itself. Did the work thus done by the Worth Bros. Company on these six initial steps bring it within the provisions of the act as being a "person manufacturing * * * shells * * * or any part of any of the articles mentioned."

Turning to the facts, we note that the six stages of shell manufacture done by Worth Bros. Company were, as found by the court below:

"(1) Smelting the ore in the blast furnace into pig iron without, however, running it into the moulds which would form what are commercially known as pigs.

"(2) In its molten state transferring it with a laddle into an open hearth furnace, where it was converted into steel and tapped out of the furnace and conveyed into moulds in the form of ingots.

"(3) Heating the steel ingot to the proper temperature for rolling when it was rolled in the blooming mill into rounds or blooms.

"(4) The rounds or blooms were then cut with a hot saw into billets of sufficient length, diameter, and weight to produce the required shell forging. At

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this point the French inspectors inspected each individual billet to determine whether there were defects in the steel, such as piping or blow holes. After acceptance of the billets so tested, they were chipped to determine whether surface defects existed. At this stage the steel billet, which was the material which was to become the shell forging, is cylindrical in shape, of approximately two-thirds of the outside diameter of the shell forging to be produced and approximately one-third of its length.

"(5) The billet was then taken to the forge shop, heated from two to three hours in a continuous furnace, and placed in the container or die of a hydraulic piercing press. It was pierced while hot by a piercing bar entering one end and pushing its way to within sufficient distance of the other end to leave a closed end or base. During this process the metal, being heated to about 2,100 degrees, is viscous, so that the metal is pushed up to the sides of the die or container. The product of this process was a cylindrical forging, hollow, with one closed and one open end.

"(6) The forging was then taken to a horizontal hydraulic bench and drawn while the metal was hot, so as to increase its length, and conform its inside and outside diameter to the required size of the forging ordered by the Midvale Steel Company."

It will, of course, be noted that all six steps were progressive advances toward the chemical constituents, the shape, and the dimension required by, and essential to, the manufacture of shells in compliance with the contract. And while, in the first three steps, the work was of such a character that the product made thereby could, up to the fourth stage, have been diverted to general commercial needs, yet, as noted, the work done in said three steps was actually done with a view to contract needs and shell requirements. With the fourth step the contract shell inspection of the French government began, and in the fifth step the fluid metal was taken, from the possibility of use for general commercial purposes, by a hollow cylindrical forging process which restricted the steel to the field of use for shells. By the sixth step this hollow cylindrical forging was drawn to a length, and to an inside and outside diameter, which enabled the Midvale Steel Company to thereafter carry forward its twenty-nine progressive steps, which, with the six of the Worth Bros. Company, were required by the contract to complete the manufactured shell of the contract. From this it will be seen the Worth Bros. Company selected the material required in the shell; it made the steel which constituted the shell; by work done upon said steel, it segregated it from the general field of commercial use and limited it to use for shell-making. That some of that material, when imperfect, was scrapped and used for other mechanical purposes only tends the more strongly to show that the work done by the Worth Bros. Company, in accordance with the contract, was shell work distinctively; for, even where it failed by not being up to contract requirements, it was so far removed from the general field of commerce that it was sold, not as an ordinary commercial product, but as scrap, and its subsequent use was only such restricted use for minor objects as scrap heaps permit. It would therefore seem clear that the volume of work done by the Worth Bros. Company—40 per cent. of the cost—and the character of that work—segregating the steel from the general field of commercial use and narrowing it to shell use—made its work such as was aptly described by the act as being "manufacturing * * * shells * * * of any kind, loaded or

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unloaded, * * * or any part" of a shell. Indeed, to say that when Worth Bros. Company made the steel which constituted the shell, and when by pressing a cavity in the steel they made an outer rim or shell which gave it such shape as committed and restricted it to shell use, to say that Worth Bros. Company, when they were doing this abnormal work and earning abnormal profits thereby, were making those profits neither from manufacturing shells nor manufacturing any part of shells is to lose sight of substance and of the purpose of Congress in using the plain, broad, inclusive words of this statute. The statute shows on its face that Congress contemplated that cases would arise where parts of the articles named would, if not indeed must, be made by joint co-operation. Indeed, the found facts in this case show that not more than two or three plants in the whole country were equipped to make a complete shell. Shell-making in this country had been going on for the two preceding years. It was well known that the shells made for the Allies in the United States were manufactured by the joint work of different plants. In the light of these facts, it would seem that a construction of the act which narrowed its application to the case of a plant that did the entire work would defeat the whole purpose of Congress, which presumably was to subject the profits of all engaged in the manufacture of shells or any part thereof to this excise tax. Such being the case, we hold the tax imposed on Worth Bros. Company was justly laid, and the judgment of the court below, which held the company could not recover the tax from the government, was right, and should be affirmed.

[5] We next turn to the case of the Forged Steel Wheel Company against Lewellyn, collector. From the proofs it appears the British government made contracts with certain persons whereby the latter agreed to supply it with high explosive shells in compliance with the specifications, requirement, and inspection of the said government. To fulfill such shell contract the contractor made subcontracts with the Forged Steel Wheel Company, by which the latter agreed to manufacture and furnish to said contractor rough steel shell forgings of the character provided in the contract, as to chemical constituents, tensile strength, size, shape, etc. To fulfill its contract, the Forged Steel Wheel Company either made, had made, or bought in the market the grade of steel required. This steel was of a common commercial type known as rounds. These rounds it nicked and broke into 18-inch lengths, which it then heated and put through two forging processes, by the first of which a hole was pierced from one end of the round to within two inches of the other; by the second, the round was lengthened by drawing it through three successive rings of a hydraulic press. The output of the Forged Steel Wheel Company's work was a hollow steel body or shell form, of suitable composition, shape, and length, from which to make, to the British government standards, the high explosive projectiles contracted for. The weight of such shell forms was about 170 pounds. To make this shell form suitable for use as a shell, the contractor to whom the Forged Steel Wheel Company then delivered it was required to dress, bore, and machine it down to 77 pounds. This required some 27 distinct and separate processes.

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Such being the facts, did the work of the Forged Steel Wheel Company noted above make it "a person manufacturing * * * shells * * * or any part of" a shell? The court below held it did not, and such holding constitutes the question involved in this case.

In reaching that conclusion the lower court construed the act as though it read "a person manufacturing * * * shells * * * or any *component, completed,* part of" a shell, in that regard saying:

"I am therefore of opinion that Congress meant to levy the tax only upon those persons who were manufacturing and selling at a profit the *completed* things specifically designated in (b), (c), (d), and (e), and on those persons who were manufacturing and selling at a profit any *completed* part of any of those designated things. That one is not a manufacturer of a part unless the manufacture of that part is carried forward by him to the same point of completion to which it would have been necessary to carry it if he had been the manufacturer of the completed thing."

The court was also influenced, first, by the fact that, as stated in its opinion,

"The completed shell is a composite structure, consisting of six different parts: First, the shell body in one piece, cylindrical in shape, with a pointed head to increase its speed in flight and its power of penetration. Second, a copper driving band near the base of the shell body, projecting slightly so as to engage the rifling of the gun. This gives the shell its rotary motion, necessary for precision in flight. Third, a base plate inserted into the bed of the shell to prevent premature discharge. Fourth, a nose bushing of two parts, one of which screws into the shell body and the other into the fuse. Fifth, the fuse, either time or percussion, a highly complicated piece of mechanism screwed into the nose bushing. Sixth, the high explosive charge. These several parts or pieces of mechanism, each delicately constructed, and designed not only individually, but with reference to each other, when assembled together, constitute a high explosive shell."

Starting with the unquestioned premise that a completed shell was made up of assembling six separate and complete parts, the court assumed that the purpose of Congress was not to tax any one but (a) the manufacturer of a completed shell, or (b) the maker of a completed part of a shell; and that because the shell form the Forged Steel Wheel Company made was not a completed part of a shell, that it was therefore not subject to the excise tax imposed by the statute.

Now, it is manifest that, standing alone, the statute neither expresses nor implies any warrant or implication for limiting the broad, inclusive, generic words "any part" to the restricted, specific, qualified term "any completed part." It follows, therefore, that ground for inferring such intent in the mind of Congress must arise from something apart from the language of the act itself. Such intent the court below found in certain decisions of the federal courts involving tariff laws which exempted from duty "manufactured" articles. And these decisions, holding what were "manufactured" articles in tariff legislation, the court below held Congress must have had in mind in passing this excise law, saying:

"We must assume that Congress well knew the distinction between a *completely* manufactured thing, or part of a thing, and a *partial* manufacture of that thing. Many revenue acts have levied a tax upon manufactured articles or parts thereof, and others have levied a tax upon a partial manufacture."

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On the other hand, in the Worth Bros. Company Case, decided above, the court below held these tariff decisions did not affect the construction of this statute, saying:

"The rule has been applied in the classification of articles of merchandise imported and subject to customs duties or upon which drawback is allowed. There are decisions as to what constitutes a manufactured article, what constitutes a part of a manufactured article, what constitutes a partially manufactured article, what constitutes a manufacture of certain material, and what constitutes a wholly manufactured article, dependent upon the terms of the law under which a tax is laid upon the article itself, or under which a drawback or other privilege is allowed. I cannot perceive that these cases have any bearing upon the question arising in this case, unless the terms of the act imply that the tax is to be imposed only upon the business of manufacturing to completion shells or parts of shells, and there is no such limitation in its terms. The clear purpose of the act is through taxation of the business or occupation of manufacturing munitions of war to reach the profits of all those engaged in such manufacture, whether engaged in manufacturing to completion or engaged in any part of such manufacturing."

We are of opinion the latter court was right in so regarding these customs decisions, for when the objects which Congress had in view in framing the customs acts and this excise law are considered it will be seen they were wholly different. In customs law the primary object of Congress in their passage was to protect domestic against foreign labor, and to effectuate this object, the customs duties were so imposed that where all the work necessary to be done upon the imported article to fit it for use in the United States had been done abroad, such article, or the part so completed and fitted for use, was to carry out that primary intent, held to be a manufactured article, or a manufactured part, and therefore subjected to the duty. On the other hand, if work upon the imported article, or imported part, before it was fit for use, remained to be done in this country, such article or part was held not to be a manufactured article within the scope of the law, and therefore not subject to the tariff duty. The necessity of bearing this primary purpose in view in construing customs acts was set forth in Tide Water Oil Co. v. United States, 171 U. S. 216, 18 Sup. Ct. 839, 43 L. Ed. 139, where the Supreme Court, referring to a customs act, said:

"The object of the section was evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries. In determining whether the articles in question were wholly manufactured in the United States, this object should be borne steadily in mind."

Indeed, it is, on the one hand, this presence of work already done which has fitted an object for use, or it is, on the other hand, a residue of work necessary to fit the object for use, which brings the article within or without the description of the manufactured article of the tariff law. This is well summarized in Tide Water Oil Co. v. United States, 171 U. S. 216, 18 Sup. Ct. 839, 43 L. Ed. 139, where it is said:

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"Raw materials may be, and often are, subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name. The material of which each manufacture is formed, and to which reference is made in section 3019, is not necessarily the original raw material—in this case the tree or log—but the product of a prior manufacture; the finished product of one manufacture thus becoming material of the next in rank."

From these decisions it will be seen that these tariff laws deal with manufactured articles, from the standpoint of protecting domestic labor, and the imposition of import duties is an incident in effectuating that main purpose.

But in the excise law in question Congress is dealing with the imposing of taxes as the main object, and with the work done as a mere incident to aid in determining the tax. In that aspect the quantum of the work done is immaterial.

Indeed, from a study of customs decisions, it will be seen that, from the basic standpoint of protecting domestic labor, the imposition of import duties is a mere incident or means to effectuating such main purpose, and the term "manufactured article" must therefore be construed and applied with such purpose in view. It follows, therefore, that in such case the quantum of labor done, or left to be done, is all-important in the practical administration of customs laws. On the other hand, the whole purpose of excise law is to produce revenue, and it is the fact of manufacture, and not the quantum of labor, that is the determining factor. Indeed, the object of the statute, viz. the raising of revenue, may be reached where a minimum of labor is used in the manufacturing taxed; for, as the net profit is the basis of taxation, it follows that the smaller the relative amount expended in physical labor in a manufacturing operation the greater may be the relative net profit which determines the tax. Moreover, it will be apparent that a manufacturing operation in which much labor has been used may not involve any net profit, while another, involving much less labor, may result in taxable net profits. It will therefore be apparent that, in an excise tax on manufacturing measured by net profits, the crucial question is not the quantum of the manufacture measured by steps, but the fact of manufacture resulting in profits. Gauging the operations of the Forged Steel Wheel Company by this standard, it would seem clear that in doing the basic shell work it did that company was, in the broad and general sense of fulfilling this contract, a "person manufacturing * * * shells, * * *" and, by virtue of the particular manufacturing stage it completed in the making of such shells, the company fell within the class of a "person manufacturing * * * any part of any of the articles mentioned." Such being the case, the excise tax was lawfully laid on the "net profits actually received or accrued"

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for said year from the sale or disposition of such articles manufactured within the United States. It follows, therefore, the judgment recovered by it below was erroneous, and must be reversed.

(258 Fed. 544)

LIPMAN, WOLFE & CO. v. PHŒNIX ASSUR. CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1919.)

No. 3262.

1. MONEY RECEIVED ⟸1—GROUNDS OF ACTION.
   Assumpsit for money had and received will lie in general, whenever defendant has received money which is the property of plaintiff, and which the defendant is obliged by natural justice and equity to return; it being unnecessary that there be an actual contractual relation.
2. PAYMENT ⟸82(1)—RECOVERY—VOLUNTARY PAYMENTS.
   One cannot recover money voluntarily paid with full knowledge of all the facts, although no obligation existed: but money may be recovered where paid under circumstances of fraud, misrepresentation, and threats amounting to duress, which prevents the free exercise of the will, or where it is paid on a wrongful demand to save the party paying from some great or irreparable mischief or damage, from which he could not otnerwise be saved.
3. PAYMENT ⟸89(3)—RECOVERY—COMPLAINT—SUFFICIENCY.
   Complaint seeking to recover from an insurance company an amount which the inexperienced officers of plaintiff corporation repaid to the company, when they were threatened by a committee of the leading insurers with publication of charges that the insurance money had been fraudulently obtained, etc., *held* to state a cause of action.
4. LIMITATION OF ACTIONS ⟸28(1)—RUNNING OF STATUTE—WHAT STATUTE GOVERNS.
   An action to recover from an insurance company moneys repaid to it by plaintiff, because of threats of a committee of leading insurers that they would publish charges that the money had been fraudulently obtained, falls within the six-year period of limitation established by L. O. L. § 6, for actions upon contracts or liability express or implied, and not within the two-year period prescribed by section 8 for injuries not arising on contract.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action by Lipman, Wolfe & Co., a corporation, against the Phœnix Assurance Company, Limited. From a judgment dismissing the complaint, plaintiff brings error. Reversed and remanded.

The plaintiff in error alleged in its complaint that it was engaged in business conducting a department store at Portland, Or., and that on March 3, 1903, it suffered loss from a fire in adjacent premises, and upon the adjustment of the loss the defendant in error paid to the plaintiff in error on its insurance policy on the stock of merchandise the sum of $5,117.60; that thereafter, on March 24, 1910, owing to threats made by a committee known as the Gallegos Committee, acting on behalf of the defendant in error and some 40 other insurance companies, to publish charges that said insurance money had been fraudulently obtained, that there was no real or actual injury to said stock of merchandise, that the plaintiffs in error dishonestly and fraudulently procured an adjustment and appraisal of loss when there was no loss, and other similar charges and threats of suit to recover said money and to publish

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to the world the alleged fraudulent acts of the plaintiff in error, and by the concerted action of all said insurance companies to expose to public opprobrium the officers of the plaintiff in error, the latter, in order to save its credit and the good name of the former owners of the business and its own, and to avoid the threatened injury to its future prosperity and success, was induced and compelled to repay to the defendant in error the said sum of money so received in adjustment of said loss; that all of said charges so made against the plaintiff in error and its officers were false and fraudulent; that to further oppress the plaintiff in error, and compel it to comply with said demands, the Gallegos Committee unjustly and without cause, and with intent to impair the insurance and financial credit of plaintiff in error, caused to be canceled policies of insurance on the property of the plaintiff in error amounting to more than $100,000; that the business of the plaintiff in error was founded in 1880 by Solomon Lipman and Adolphe Wolfe; that on July 7, 1909, Solomon Lipman died, leaving surviving him his widow and two sons, W. F. and I. N. Lipman, both young, who succeeded to his interest in the corporation; that, at the time when the defendant in error obtained from the plaintiff in error the money which is sued for, Adolphe Wolfe was absent from the state, caring for his sick wife; that W. F. and I. N. Lipman were in a state of nervous tension for the success of the business left them by their father; that all executive matters in said business had theretofore been handled by their father and Adolphe Wolfe, and that their business judgment was palsied, their sense of business proportion paralyzed, and their faculties for caring for the interests of the plaintiff in error were entirely overpowered, and they were then arranging for the construction of a large ten-story department store building, all of which circumstances were taken advantage of by the said Gallegos Committee, at a time when the said W. F. and I. N. Lipman were mentally confused and incapable of getting any full comprehension of the circumstances and deprived of free and voluntary will in the matter; that the defendant in error, in so obtaining said money by duress and threats, acted through the Gallegos Committee, which represented, not only the defendant in error, but numerous other insurance companies which had policies of insurance, and which likewise paid the plaintiff in error losses for the injuries resulting from the fire; that in the year 1910, in another suit pending in a state court of the state of Oregon, the said false, untrue, and unfounded allegations against the plaintiff in error were made public. And the complaint alleged that the defendant in error is indebted to the plaintiff in error in the said sum of $5,117.69, as for money had and received, and judgment was demanded for said sum and interest thereon from the date of the payment thereof. A demurrer was interposed to the complaint on the grounds (1) that it does not contain facts sufficient to constitute a cause of action; (2) that the action was not commenced within the time limited by the Code of the state of Oregon; and (3) that the plaintiff had been guilty of laches in commencing the action. The demurrer was sustained on the second ground, the court ruling that the action was barred by section 8, Lord's Oregon Laws. To review the judgment thereupon entered, dismissing the complaint, the cause is brought before us by writ of error.

William C. Bristol, of Portland, Or. (F. E. Grigsby and Ernest W. Hardy, both of Portland, Or., of counsel), for plaintiff in error.

W. F. Magill, of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The first question which arises is whether the complaint states a cause of action. In Cary v. Curtis, 3 How. 236, 247 (11 L. Ed. 576), the court said:

"The action of assumpsit for money had and received, it is said by Lord Mansfield, Burr, 1012, Moses v. MacFarlen, will lie in general whenever the

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defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in Stratton v. Rastall, 2 T. R. 370, 'that this action has been of late years extended on the principle of its being considered like a bill in equity, and therefore, in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and could recover in a court of equity.' These are the general grounds of the action as given from high authority."

In Bither v. Packard, 115 Me. 306, 312, 98 Atl. 929, 932, the court said:

"It is elementary law that, when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such cases an action for money had and received may be maintained. This form of action is comprehensive in its reach and scope, and though the form of proceeding is in law it is equitable in spirit and purpose and the substantial justice which it promotes renders it favored by the courts. It lies for money paid under protest, or obtained through fraud, duress, extortion, imposition, or any other taking of undue advantage of the plaintiff's situation, or otherwise involuntarily and wrongfully paid. Where the defendant is proved to have in his hands the money of the plaintiff which, ex æquo et bono, he ought to refund, the law conclusively presumes that he has promised to do so"—citing Mayo v. Purington, 113 Me. 452, 455, 94 Atl. 935.

To the same effect are Gaines v. Miller, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466; Taylor v. Currey, 192 Ill. App. 502; Early v. Atchison, T. & S. F. Ry. Co., 167 Mo. App. 252, 149 S. W. 1170; Cullen v. Sea Board Air Line, 63 Fla. 122, 58 South. 182; Knight v. Forbes, 19 Ga. App. 320, 91 S. E. 445, in which the court said that such an action needs for its support no actual contractual relation, for the law will imply a quasi contractual relation to uphold it whenever the circumstances so require.

[2, 3] One cannot recover money voluntarily paid with a full knowledge of all the facts, although no obligation to pay existed, but money may be recovered where paid under circumstances of fraud, misrepresentation, and threats amounting to a duress which prevents the free exercise of the will, or where it is paid on a wrongful demand, to save the party paying from some great or irreparable mischief or damage from which he could not otherwise be saved, and while money paid under apprehension, or induced by threats of suits or actions, is not in general paid under such duress as to make the payment compulsory, such threats may, in connection with other circumstances, such as the inexperience of the person threatened, or the peril to which his business is exposed, if the threats are carried out, constitute such duress that money paid under the influence thereof may be recovered as for money had and received. Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Lehigh Coal & Nav. Co. v. Brown, 100 Pa. 338; Guetzkow Bros. Co. v. Breese, 96 Wis. 591, 72 N. W. 45, 65 Am. St. Rep. 83; Vyne v. Glenn, 41 Mich. 112, 1 N. W. 997; Baldwin v. Hutchison, 8 Ind. App. 454, 35 N. E. 711; Brown v. Worthington, 162 Mo. App. 508, 142 S. W. 1082; Rees v. Schmits, 164 Ill. App. 251; Sartwell v. Horton, 28 Vt. 370; Parmentier v. Pater, 13 Or. 121, 9 Pac. 59.

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Here the complaint alleges the inexperience of the officers of the plaintiff, their mental disturbance in view of the threats and fraudulent representations, the large pecuniary interest involved in their business, and the powerful combination arrayed against them, represented by the Gallegos Committee, acting for and on behalf of more than 40 insurance companies, practically the whole insurance world, with power to destroy the credit of the plaintiff in error, and to prevent it from obtaining insurance upon its property. The combination against the plaintiff in error which is set forth in the complaint is not unlike that which was condemned in Carew v. Rutherford, supra, and we think the facts alleged are sufficient to constitute a cause of action for money had and received.

[4] The second question here is which of the two following provisions of the statute of limitations of Oregon applies to the cause of action,

"Sec. 6. Within six years: An action upon a contract or liability express or implied * * *"

"Sec. 8. Within two years: An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not herein especially enumerated."

The action for money had and received has always been regarded as an action in assumpsit, based upon a promise to repay which the law implies, where one has possession of money which in equity and good conscience belongs to another. "Having money that rightfully belongs to another, creates a debt; and whenever a debt exists without any express promise to pay, the law implies a promise, and the action always sounds in contract." Byxbie v. Wood, 24 N. Y. 607, 610. In that case it was held, that where one person fraudulently procures money of another, the law will imply a promise to repay it, and the injured party need not sue in tort, but may sue in assumpsit for money had and received. In Brewer v. Dyer, 7 Cush. (Mass.) 337, 340, the court said:

"The law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

That there is in such a case an implied promise to pay is generally recognized in the authorities, and it is so held in the state of Oregon. First National Bank v. Hovey, 34 Or. 162, 55 Pac. 535; Hornefius v. Wilkinson, 51 Or. 45, 93 Pac. 474. In 1 Wood on Limitations (4th Ed.) page 95, it is said:

"Without multiplying instances, generally assumpsit lies for the breach of any simple contract, and in all cases where a contract or promise exists by express act of the parties, or where the circumstances are such that the law will imply a promise; and it may be said that under this head a recovery may be had for tortious acts properly embraced under the head of actions ex delicto in all those cases where, from the circumstances of the case, the law will imply a promise on the part of the wrongdoer to reimburse the party injured by his act."

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"In cases where a tort may be waived, and assumpsit brought therefor, the latter action will lie, even though an action for the tort is barred by the statute."

Among the cases cited are Ivey's Adm'r v. Owens, 28 Ala. 641; Lamb v. Clark, 5 Pick. (Mass.) 193; Kirkman v. Philips' Heirs, 7 Heisk. (Tenn.) 222; Miller v. Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264; Whitaker v. Poston, 120 Tenn. 207, 110 S. W. 1019; Fanson v. Linsley, 20 Kan. 235; Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782.

We may assume that the statute of limitations of Oregon was framed with a view to existing recognized forms of actions, and that when a limitation of six years was placed upon the commencement of actions "on a contract or liability express or implied," it was intended to apply the same to all actions in assumpsit including that for money had and received. Such seems to have been the construction placed upon similar statutes of limitation in other states. In Trower v. City and County of San Francisco, 157 Cal. 762, 109 Pac. 617, the court said:

"The action is one to recover moneys unjustly exacted and retained by defendant. It is assumpsit for money had and received, and therefore an action 'upon a contract, obligation or liability not founded upon an instrument in writing.'"

In Kentucky it was held that an action for money had and received was governed by the statute of limitations applicable to cases "arising on a contract express or implied." Clark v. Logan County, 138 Ky. 676, 128 S. W. 1079. In Missouri, the statute barred after five years all actions on "contracts, obligations or liabilities, express or implied." It was held that the action for money had and received was governed thereby. Garrett v. Conklin, 52 Mo. App. 654. In Leather Manuf. Bank v. Merchants' Bank, 128 U. S. 26, 9 Sup. Ct. 3, 32 L. Ed. 342, the action was brought to recover money paid on a forged check. The court held that under the New York statute the action was one on a "contract, obligation or liability, express or implied." The action in the present case, having been commenced within six years, we think the cause of action was not barred.

The judgment is reversed, and the cause is remanded to the court below for further proceedings.

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(258 Fed. 549)

THE DANIEL McALLISTER.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

Nos. 134, 135.

1. COLLISION ⇐71(2)—TOW LEAVING SLIP—NEGLIGENT TOWAGE.
A tug, which negligently attempted to take a coal barge out of a slip in East River on a strong flood tide on a hawser instead of alongside, *held* solely in fault for a collision between her and vessels lying at the end of the pier and resulting collisions between such vessels, which were broken from their moorings, and others.

2. COLLISION ⇐71(3)—CONTRIBUTORY FAULT—VESSELS TYING AT END OF PIER.
The fact that barges were tied up at the end of a pier in violation of the statute *held* not a contributory cause of a collision between them and a barge being towed from an adjoining slip, where there was ample room for the tow to pass safely if properly navigated.

3. NEGLIGENCE ⇐62(1)—PROXIMATE CAUSE OF INJURY—INTERVENING ACT.
If there is an unbroken connection between the act and the injury, the act causes the injury, and an intervening act is not the proximate cause of the injury unless it is efficient to break the causal connection.

Appeals from the District Court of the United States for the Eastern District of New York.

Suits in admiralty for collision by John D. Lohman against the steamtug Daniel McAllister with others impleaded, and by Charles H. Castle against the steamtug Daniel McAllister and others. Decree for libelants, and McAllister Bros., claimants, appeal. Affirmed.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellants.

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellee Lohman.

Macklin, Brown & Purdy, of New York City (William F. Purdy, of New York City, of counsel), for appellee The Kaaterskill No. 2.

Harrington, Bigham & Englar, of New York City (George E. Hargrave and T. Catesby Jones, both of New York City, of counsel), for appellees Clayton and New York Cent. R. Co.

Charles M. Sheafe, Jr., of New York City, for appellee New York, N. H. & H. R. Co.

Herbert Green, of New York City, for appellee Erie R. Co.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] On February 1, 1916, at about 4 p. m., the steamtug Daniel McAllister undertook to shift the coal barge Ruth C. Lohman from the slip between piers 31 and 32, East River, intending to get her a berth on the northerly side of Pier 32. Here, she was to discharge her cargo of coal, nearly 500 ton. The barge was lying, stern out, on the northerly side of Pier 31, about halfway up the slip, at the bulkhead. After making fast on a bridle hawser some 50 to 75 feet in length, the tug towed the barge, stern

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first. The weather was fair and clear and with little wind. There was a strong flood tide. Before making fast, the captain of the McAllister expressed doubt, to an officer of the coal company near by, whether it was safe to take the barge out of the slip in view of the tide. He, however, proceeded to do so in the manner described. The barge was about 97.4 feet in length and 21 feet in width. The McAllister was about 24 feet wide. The space between the southerly end of the rack and the northerly corner of Pier 31 was about 106 feet, and this, with the exercise of care in navigation, particularly if the barge was tied alongside, would permit proper control of the movements and insure a safe passage. The tugboat went straight out, instead of pulling down against the tide. This made her tow shear toward some covered barges which were moored at the end of Pier 32. The McAllister did not head into the tide as soon as she should have done in order to offset it, and, when she attempted it, she did not have power enough to overcome the tide. The tide struck the Lohman as soon as she passed beyond the pier end, and, when she was about one-third part of the slip, her stern swung upstream coming in collision with the barge Clayton. At the end of Pier 32 and nearest to the pier, in the order named, were the Erie barge No. 223, Lehigh Valley barge No. 27, the Clayton, and the Kaaterskill. They were overlapping both the pier end and the rack, having been shifted some 15 feet by the lighter Graylock from a position right at the end of Pier 32, to a position in which they overlapped the rack so that they were 50 feet north of its slanting wing. The collision was of sufficient force to cause damage to the Clayton and drive the four barges adrift.

The flotilla in turn struck three or four barges at the end of Pier 33, breaking their fasts. The drifting flotilla carried away other boats at Pier 36. Alarms were blown by the McAllister, and the transfer tug No. 9 and transfer tug No. 7 of the New York, New Haven & Hartford Railroad Company, which were lying at Piers 38 and 40, came to the rescue. The No. 7 picked up some drifting boats. The No. 9 undertook to land the rest of the flotilla, and, while so doing, one of the flotilla struck the Haines then lying at Pier 41. The Haines was damaged and is the subject of a companion suit to be considered hereafter in this opinion. While this drifting took place, the Lohman was fast to the McAllister by the starboard line, as the line of the barge's port line parted shortly before the boats came to Pier 41. The Clayton struck and damaged the Haines which was lying outside of the end of the car float on the northerly side of Pier 41; the transfer No. 7 assisted the McAllister in towing the Lohman to Pier 32 for the reason, as stated by the McAllister's captain, she was not strong enough. In landing her tow at this, her original destination, the McAllister broke another part of the Lohman's rail by a collision with the stern of the covered barge. It was while the No. 9 was getting these boats in shore that the Clayton came in contact with the side of the Haines and the Lohman got under the bow of the Kaaterskill or the Clayton. There are divergent views as to which boat actually struck the Haines, but this is not important. It was while in this position that the McAllister swung alongside the Lohman and attempted to

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push her ashore against the southeasterly corner of Pier 41 and across the forward corner of the Haines which, at that time, was partly down across the end of Pier 41. It is claimed, however, that the transfer No. 9, which was assisting in this maneuver and trying to avoid the drifting of the boats, was negligent in the manner in which she attempted to land the boats, allowing them to bump against the side of the Haines. The McAllister interpleaded the Lehigh Valley barge No. 27, the Erie barge No. 223, the New York Central barge Clayton, and the barge Kaaterskill No. 2. The Kaaterskill No. 2 denies any responsibility on her own part and alleges the fault to be that of the McAllister or the New York Central, which was the charterer of the barge Kaaterskill at the time and had moored her at the place named by one of its own tugs. The New York Central, on the other hand, denies that it was in charge of the barge Kaaterskill No. 2, and denies that it was at fault for the collision because of the presence of either the Kaaterskill No. 2 or the Clayton at the time of the disaster. The Erie Railroad denies fault, and alleges that the four boats off the end of the pier had but shortly been in that position, having been placed there by the Graylock. The McAllister denies fault on its part and contends that the collision was caused by the position of the barges at the end of the pier which, it says, was in violation of section 879 of the City Charter (Laws N. Y. 1901, c. 466). This statute forbids boats lying across pier ends in the North and East Rivers "except at their own risk of injury from vessels entering or leaving any adjacent dock or pier." It is a fault under the maritime law, irrespective of the section of the charter, to unnecessarily interfere with vessels entering or leaving slips. Westernland (D. C.) 24 Fed. 703.

[2] Responsibility for damage by barges thus found at the end of piers depends upon circumstances, but its distance in or out, as governed by the boats lying between it and the end of the pier, cannot determine liability. To be sure, each boat, beginning with the one on the outside, is responsible for the remaining ones moored off the pier end to the extent as the position in which it is moored violates the section of the charter. The Lohman struck the Clayton, the third boat out, and therefore the two inner boats, the Lehigh Valley barge No. 27 and the Erie barge No. 223, were not in such a position as to interfere with the movements of the Lohman in attempting to come out of the slip. They should therefore not be held at fault. Their presence simply made part of the physical situation which required the mooring of the Clayton and the Kaaterskill in a position further out at the pier's end. But the position of the Clayton and the Kaaterskill was not the proximate or producing cause of the collision. It sufficiently appears that the McAllister was negligent in attempting to leave the slip in a flood tide, having the barge made fast on a bridle hawser instead of alongside. The captain of the McAllister knew, or should have known, that he could not successfully buck the tide with the Lohman. He says he intended merely to drop back so as to drop her in at the pier to which she was destined. He thought he would swing clear of the barges that he knew were lying off the end of

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Pier 32. He must be condemned for attempting to undertake a maneuver, such as this, in too small a space and in failing to prepare to meet the force of the tide and direct his navigation accordingly.

As was to be expected, the Lohman and the McAllister drifted back immediately as they rounded Pier 31 and thus diminished the space in which the Lohman could swing out into the river, even though the space was wide enough to allow her to make the turn if the tide had less force. Such a collision as this record discloses, indicates an absence of good seamanship and due performance by the tug of its duty to the tow. Such a result may be a safe criterion by which to judge of the character of the act which caused it. Steamer Webb, 81 U. S. (14 Wall.) 406, 20 L. Ed. 774. To make the attempt when the captain knew he had not sufficient power to keep or regain control of his tow is, of itself, a fault, for the tug impliedly represents herself as having sufficient power for the services she undertakes. Chas. B. Sandford, 204 Fed. 77, 122 C. C. A. 391. If the tide was too strong, the McAllister should have waited for a slack water. The Margaret, 94 U. S. 494, 24 L. Ed. 146; The Potomac (D. C.) 147 Fed. 293.

The fact that the Clayton and the Kaaterskill were in a position which, to some extent, may have interfered with the carrying out of the maneuver attempted by the McAllister and reduced the room to navigate as intended, cannot fix liability upon either boat. The occurrence was in the daytime. The tide was known; the danger was observed by the captain of the McAllister. There was no sudden emergency, such as a storm or other vessels navigating to reduce the space. The presence of the barges at the pier's end did not give the McAllister the right to dispense with care. The Cincinnati (D. C.) 95 Fed. 304. It has been recently decreed by this court that a vessel is not absolutely prevented from lying at the pier end and therefore prevented from recovering from manifest tort-feasors, and, further, that a violation of the statute is sufficient evidence and sufficient reason for imputed fault to the violator, and the consequence of such violation is that the violator cannot recover for injuries inflicted by vessels entering or leaving any adjacent pier. The New York Central No. 18 257 Fed. 405, 168 C. C. A. 445, decided Feb., 1919. There Judge Hough said:

"A departure therefrom [the statute], like a departure from any other legal rule, is evidence of negligence and casts on the violator the burden of showing affirmatively that the violation did not contribute to the injury giving rise to suit. Undoubtedly, such violation * * * can be invoked only by vessels of the class enumerated in the statute, viz., those 'entering or leaving' a slip adjacent to the pier end at which the offender lies; and even a violation of rule does not give any one the right to dispense with care, and treat a vessel wrongfully, at the pier end as an outlaw."

We think that the presence of the barges at the end of the piers was not a contributory cause of the collision, and that the proximate and producing cause was the negligent navigation of the McAllister, and she is held solely at fault for the damage done the Lohman by reason of this collision. We therefore conclude that the McAllister was to blame for the collision and causing the barges to go adrift.

[3] In the second action in which the owner of the Haines seeks

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to recover for damages done to that vessel, we are of the opinion that the McAllister is solely at fault. Transfer No. 9 came to the rescue and was unable to avoid the collision with the Haines because of the drift of the tide. The damage was done by the boat striking the Haines' port side and driving her starboard side against a car float. Whether that boat was the Lohman or the Kaaterskill is in dispute. The Haines was damaged by this flotilla striking against her, and it makes little difference which boat it was. There was nothing which was done by the transfer No. 9 which changed the general direction of the flotilla in its drift toward the pier where the Haines was moored. The McAllister set in motion a train of events involving this series of collisions which, with the added impetus due to the tide, must be charged against the McAllister. Her negligent operation was the proximate cause which set the other causes in motion. If there is an unbroken connection between the act and the injury, the act causes the injury and the intervening act is not the proximate cause of injury unless it is efficient to break the causal connection. Muller v. Firemen's Ins. Co., 246 Fed. 759, 159 C. C. A. 61.

Decree affirmed.

(258 Fed. 553)

THE NEW YORK CENTRAL NO. 28.

(Circuit Court of Appeals, Second Circuit. March 24, 1919.)

No. 153.

1. COLLISION ⟸50—INLAND RULES—OVERTAKING VESSEL—"FINALLY PAST AND CLEAR."

An overtaking vessel, which had passed the one overtaken half or three-quarters of a mile before changing course, and was then 300 to 500 feet ahead, was "finally past and clear," within article 24 of the Inland Rules (Comp. St. § 7898), and relieved of the burden of keeping out of the way.

2. COLLISION ⟸102—OVERTAKING VESSELS—NEGLIGENT NAVIGATION.

A collision between a ferryboat and steam lighter, both passing down Hudson river, *held* due to faults of both vessels; the ferryboat, which was ahead, for unnecessarily changing her course across that of the lighter, and the latter for proceeding at full speed, without paying any attention to the passing signals and positions of the vessels ahead.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by the Erie Railroad Company, owner of the ferryboat Chautauqua, against the steam lighter New York Central No. 28; the New York Central Railroad Company, claimant. Decree for respondent, and libelant appeals. Modified.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (Dix W. Noel, of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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ROGERS, Circuit Judge. This suit is brought to recover damages occasioned by a collision which occurred on January 27, 1917, in the Hudson river between the ferryboat Chautauqua, owned by libelant, and the steam lighter New York Central No. 28, owned by the New York Central Railroad Company. The District Judge entered a decree dismissing the libel, on the ground that the Chautauqua was solely in fault.

It appears that the Chautauqua left Weehawken Cove at Seventeenth street, Hoboken, bound for her slip at the foot of Chambers street, New York. The tide was a strong ebb, the weather clear, and it was about 7 a. m. when the Chautauqua started on the trip. On her way down the river, and at about Pier 28 she overtook and passed lighter No. 28 going down on her port side on a parallel course. The Chautauqua was proceeding through the water faster than No. 28, which was making about 8 miles per hour. The Chautauqua passed the No. 28 on the Chautauqua's port side. When the Chautauqua was about 1,200 feet from her slip at Chambers street, the New York Central steam lighter No. 29, which was proceeding down the river ahead of the No. 28 and upon the port bow of the Chautauqua, without any signal, ported her wheel and changed her course across the bow of the Chautauqua, and between the Chautauqua and the steam tug Jersey Central, bound up the river below the Chautauqua, with a car float upon her port side. The Jersey Central was ahead of the Chautauqua and about 1,000 feet further down the river. The Chautauqua had previously exchanged a signal of two blasts with the Jersey Central coming up with a float on her port side. When No. 29 changed her course, to go between the Chautauqua and the Jersey Central, the engines of the Chautauqua were put at slow speed to avoid a collision with the No. 29, and the wheel of the Chautauqua was moved one or two spokes to starboard. The Jersey Central starboarded her wheel after an exchange of signals of two whistles with the Chautauqua, and was compelled to stop her engines in order to let No. 29 cross her bow. When the signals of two whistles were exchanged between the Chautauqua and the Jersey Central, the No. 28 was from 300 to 500 feet on the port quarter of the Chautauqua. The No. 28 kept on at full speed, apparently unmindful of the situation ahead of her, and especially of the No. 29 changing her course to starboard in order to go between the Chautauqua and the Jersey Central, compelling the Chautauqua to reduce her speed, until in the jaws of collision with the Chautauqua. The No. 28 stopped and reversed her engines, but too late to avoid a collision; the stem of the No. 28 coming into contact with the port side of the Chautauqua.

[1] The District Judge dismissed the libel on the ground that the Chautauqua was the overtaking vessel at the time she put her wheel slightly to starboard. He said:

"The Chautauqua was originally the overtaking vessel, and did not cease to be so under Inland Regulation No. 24 (Act June 7, 1897, c. 4, § 1, 30 Stat. 101 [Comp. St. § 7898]) until fully past and clear of No. 28, which she was not when she starboarded. Therefore I find her at fault."

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The rule referred to may be found in the margin.[1]

This court is satisfied that the Chautauqua is not within the limitations of the inland rule, but had been relieved of the duty of keeping clear of No. 28; she being "finally past and clear" of that vessel when she starboarded. The answer of No. 28 admits this, for in the seventh article it states:

"No. 28 was a considerable distance ahead of the Chautauqua, but as the Chautauqua was a faster vessel than No. 28 she overtook and passed No. 28 when No. 28 was about off the Lackawanna Terminal at Hoboken. Stokes, the master of the No. 28, states that the Chautauqua was a faster boat than the No. 28 and she kept gaining on the No. 28."

And the testimony of the master of No. 28 supports the answer in this respect, as does all the other testimony in the case. The evidence shows that the Chautauqua passed No. 28 a half or three-quarters of a mile from the place of collision. So that we conclude that the Chautauqua was not, as the court below held, the overtaking vessel.

[2] The action of No. 29 in changing her course to starboard in order to go between the Chautauqua and the Jersey Central has been mentioned. This conduct on the part of No. 29 was atrocious. The testimony that it happened is not to be doubted. It is shown by the testimony of those on both the Chautauqua and the Jersey Central, and no one was called from No. 29 to contradict it. This conduct of the No. 29 made it necessary for the Chautauqua and the Jersey Central to slow up to avoid the No. 29, in cutting across the bows of both vessels.

The Chautauqua, however, is not without fault. As she was proceeding on her way down the river and was about opposite Pier 25, she altered her course to port and without warning to the vessels on her port side. The action of No. 29 in crossing the bow of the Chautauqua made it necessary for the latter to slow down, which she promptly did, but that it necessitated a change of course is not true. In fact, the change of course was not made until No. 29 had proceeded on her way. In starboarding her helm the Chautauqua directed her course, as we have said, across the bow of the vessels on her port side, including No. 28. In so doing the Chautauqua, then the overtaken vessel, did an unnecessary thing, and swung without warning or signal across the path of the oncoming No. 28. The result was a collision; the stem of No. 28 striking the Chautauqua just forward of amidships on the port side.

[1] "Art. 24. Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

"Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

"As by day the overtaking vessel cannot always know with certainty whether she is forward of or abaft this direction from the other vessel, she should, if in doubt, assume that she is an overtaking vessel and keep out of the way."

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We have not overlooked the fact that the Chautauqua denies a swing of more than two points. We think it probable she changed more than two points; but, if she changed only two points, it does not appear that even that change was necessary to avoid the Jersey Central.

It appears to us that No. 28 was also at fault. It is evident that she was at the time in charge of incompetent persons. There were three deckhands in or about the pilot house, who were in charge of her navigation, none of whom was a licensed man. A competent lookout upon the No. 28 would have paid some attention to the exchange of the signal of two whistles which the Chautauqua gave to the Jersey Central, and which the latter immediately answered; and a competent lookout would have observed the maneuver of No. 29 in crossing the bow of the Chautauqua and of the Jersey Central. But no one in charge of the navigation of No. 28, so far as the record discloses, paid any attention to the conditions existing in front of her, and she was allowed to continue on her course at full speed until the danger signals given by the Chautauqua warned her of the impending collision. The mate, an unlicensed man, who was in the pilot house and in charge, says that he did not hear the exchange of whistles between the Chautauqua and the Jersey Central, and he did not see the No. 29 pass the bow of the Chautauqua, and that he did not change the course of the No. 28. No slow bells were given and her speed was not reduced until she was right in the jaws of the collision. He admitted that he knew nothing about the inspectors' rules or the United States statutes regarding navigation. When the signals were exchanged between the Chautauqua and the Jersey Central, No. 28 was within 300 or 500 feet from the port quarter of the Chautauqua. The situation was such as unquestionably made it the duty of No. 28 to stop and reverse, and if that had been done the collision might have been avoided. The language of the Supreme Court in The New York, 175 U. S. 187, 207, 20 Sup. Ct. 67, 74 (44 L. Ed. 126), is applicable to the facts of this case. The court said:

"The comments we have made upon the failure of the Conemaugh to stop and reverse are equally pertinent to the case of the New York. If she did not hear the whistles of the Conemaugh, she ought to have heard them; but, irrespective of this, there was enough to apprise her of her danger in pursuing her course with unabated speed. * * * Her conduct was inexcusable. The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that those repeated admonitions must ultimately have some effect. We cannot impress upon masters of steam vessels too insistently the necessity of caution in passing or crossing the course of other vessels in constricted channels."

The District Judge thought that in the situation in which No. 28 was placed she could not have safely starboarded on account of the Vigilant, nor safely ported on account of the Chautauqua. But, as we have already pointed out, her duty was to stop and reverse; this she did not do until it was too late. As both vessels were at fault the damages should be divided.

The cause is remanded to the District Court for the Southern District of New York, with directions to modify its decree in accordance

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with this opinion, and, as so modified, the decree is affirmed. Costs will be divided equally in the court below. In this court the appellant has the costs of this appeal.

(258 Fed. 557)

MANNERS v. MOROSCO.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 201.

1. COPYRIGHTS ⟸50—CONTRACTS—CONSTRUCTION—CONTRACT GRANTING RIGHT TO PRODUCE PLAY.

A contract by which the author of a play granted to another "the sole and exclusive license and liberty to produce, perform and represent" the play in the United States and Canada, and in which the grantee agreed to continue the play "for at least 75 performances" during the ensuing season and "for each theatrical season thereafter for a period of five years," and that, if during any one year the play had not been produced for 75 performances, his rights should cease and determine and revert to the grantor, *held* not to terminate at the end of five years, but to continue in force so long as its obligations were performed by grantee.

2. COPYRIGHTS ⟸50 — CONTRACTS — CONSTRUCTION — CONTRACT GRANTING RIGHT TO PRODUCE PLAY—ASSIGNMENT OR LICENSE.

An agreement for production rights in a play binding the parties, heirs, executors, assigns, administrators, and successors, is an assignment and not a mere license.

3. COPYRIGHTS ⟸50 — CONTRACTS — CONSTRUCTION — CONTRACT GRANTING RIGHT TO PRODUCE PLAY.

A contract granting "the sole and exclusive license and liberty to produce, perform and represent" a play, *held* to carry the motion picture rights.

Ward, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by J. Hartley Manners against Oliver Morosco. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 254 Fed. 737.

Certiorari granted 250 U. S. ——, 39 Sup. Ct. 494, 63 L. Ed. ——.

Walter C. Noyes and David Gerber, both of New York City, for appellant.

William Klein and Charles H. Tuttle, both of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge [1] The appellant is the author of "Peg O'My Heart." He is the husband of Laurette Taylor, the star of that very successful play as dramatized.

On January 19, 1912, the parties entered into a contract which in part provided and granted to the appellee "the sole and exclusive license and liberty to produce, perform and represent the said play in

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the United States of America and the Dominion of Canada." The third paragraph provided:

"The party of the second part (appellee) agrees to produce the play not later than July 1, 1913, and to continue the said play for at least 75 performances during the season of 1913–1914 and for each theatrical season thereafter for a period of five years."

The fifth paragraph provides:

"That the said party of the second part (appellee) further agrees that if during any one theatrical year such year to begin on the first day of October, said play has not been produced or presented for 75 performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part."

After the contract was made, the play was produced and ran continuously and successfully for a period of 74 weeks up to May 30, 1914, in New York, with Laurette Taylor in the star part. On July 20, 1914, the parties entered into an agreement modifying in some respects the agreement of January 19, 1912. By the modification, arrangement was made for the production of the play without Laurette Taylor in the star part and for other productions in more than one company. It was further provided that the appellee be permitted to lease, stipulate, assign, transfer, or sell to any one, any of his rights under either contract. And it was specifically covenanted that the issue now presented between the parties as to the ownership of motion picture rights was to be determined by reference to the original contract. After the execution of this contract, a number of companies gave performances in various parts of the United States and Canada. Payment under the terms of the contract was duly made to the appellant.

When the theatrical season of 1917–1918 expired, the appellant, claiming that the appellee no longer had any interest in any of the producing rights, brought this action to restrain further production of the play by the appellee, both on the stage and in motion picture form. Two questions are presented by counsel on this appeal: First, the date, if any, of the termination of the contract; and, second, whether the appellee under the contract is entitled to the motion picture rights.

It is claimed by the appellant that only a license, revocable at his option, was contracted for with the appellee under the third paragraph of the first contract, and that the contract expired at the end of the theatrical season in May, 1918. But that is not what was contracted for. It was not an agreement for personal service or for a mere license, but was a bargain and sale of the sole and exclusive right to produce, perform, and represent the said play in the United States and Canada. Property was thereby granted and conveyed. It may be intangible, but it has a value and is the subject of proprietorship. It is not a conveyance which is revocable at will or for a temporary period, but for the time provided for in the terms of the contract.

The third paragraph is a covenant setting forth the least that the appellee would do in performing the contract. In other words, it sets forth the appellee's assurance of his bona fide endeavor or attempt to

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make the play a success and thus secure to the appellant some substantial royalties. A mere reading of the paragraph will indicate that the parties fixed a minimum and not a maximum of endeavor on the part of the appellee to make for success. It is not an agreement of the most that the appellee agreed to do to make for success. In this connection, the fifth paragraph must be considered and read with the third paragraph. Plainly, if the appellee had failed to present 75 performances of the play "during any one theatrical year," then all rights of the appellee ceased and determined and the play reverted to the appellant. There is harmony between the first and third paragraphs and the intent of the parties that the appellee's rights should not be limited to any definite period is quite plain. The grant was perpetual if the obligations of the contract, particularly paragraphs 3 and 5, were complied with.

[2] The modified contract made on July 20, 1914, reaffirmed the first contract and provided in the ninth paragraph that, at least four years after its date, the original contract was still in force, as a conveyance of all the production rights, and that neither party would produce the play in motion picture form without the consent of the other and until such time, when, after the expiration of four years, the question of motion picture rights should be determined pursuant to the terms of the original agreement.

This clearly negatives the claim of the appellant that under the third paragraph the contract expired after five years from January 19, 1912. An agreement for production rights binding the parties' heirs, executors, assignees, administrators, and successors, is an assignment and not a mere license. Photo Drama Motion Picture Co. v. U-Film Corp. (D. C.) 213 Fed. 374, affirmed 220 Fed. 448, 137 C. C. A. 42.

Since the contract is not revocable by will by either party or otherwise limited as to its duration by its express terms or by the inherent nature of the contract itself with reference to its subject-matter, it is presumably intended to be permanent or perpetual in the obligation it imposes. Western Union Telegraph Co. v. Penn. Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968.

[3] In determining the production rights conveyed, whether it included the right to produce in motion picture form or not, we must confine our study to the contract itself. The intention of the parties must be secured from the language employed in the instrument itself. Such intention means the accepted reasonable and judicial settled content of the words employed. If the parties have erred in the use of the words, this kind of action cannot grant relief. The words employed, "the sole and exclusive license and liberty to produce, perform and represent the said play," have received judicial construction. A motion picture performance is a stage representation of the play and violative of the rights of an owner of the exclusive right of production. Frohman v. Fitch, 164 App. Div. 231, 149 N. Y. Supp. 633.

Ordinarily, one may "produce or perform" a spoken play upon the stage, but "to represent" seems to be peculiarly appropriate to a motion picture representation of a play. Dramatic rights were held to include the motion picture rights in Frohman v. Fitch, supra, in the

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absence of other words narrowing the meaning of the contract. An author of dramatic composition is protected by section 4952 of the Revised Statutes of the United States as to not only the sole right of printing it, but also the sole right of "publishing, performing or representing it or causing it to be performed or represented by others." Nor need we be confined in our determination to a strict legal use of the words employed as heretofore judicially determined. It is apparent that the parties intended the results here pronounced. We think the parties intended a conveyance of the entire right to place the play before the American public in any form. It seems inconceivable that the parties intended to reserve to the appellant the right of production in motion picture form when they gave no such expression of reservation in the language of the contract, and particularly when the language employed indicated a comprehensive grant of all producing rights.

In paragraph 10 of the first contract, the author reserved the right to print and publish the play, but his right was not to be exercised within six months after the production of such play in New York City unless by written consent of the manager. So, too, reservations were made as to leasing and sub-letting the play. By the tenth paragraph, the author reserved the right of publication in book form.

An expression in the contract of one or more things of a class implies the exclusion of all not expressed, although all would have been implied had none been expressed. 13 Corpus Juris, 537.

In view of what appears in this record of the cost and expense of successfully dramatizing this play and what appears to be a lucrative contract resulting to the appellant, this court should be reluctant to give a construction not warranted by the language nor intended by the parties, which would permit of competition by the appellant in the production of this play in motion pictures. Frohman v. Fitch, 164 App. Div. 231, 149 N. Y. Sup. 633.

Appellant, however, says that Klein v. Beach, 239 Fed. 108, 151 C. C. A. 282, supports his views. In that case, it was recited, "whereas the manager wishes to engage the services of the author to dramatize the said book for presentation on the stage," and the novelist granted to the author "the sole and exclusive right to dramatize the said book for presentation on the stage," and the parties agreed to grant to the manager "the sole and exclusive license and liberty to produce, perform and represent the said play or dramatic composition on the stage," the right to dramatize the novel for presentation on the stage was held not to carry the right to produce in motion pictures. This court, in considering Klein v. Beach, supra, said:

> "The turning point in this case, is the scope of the grant, whether by its terms it conferred upon Klein dramatic rights in the larger sense including presentation, not only by living actors, but also by motion pictures, or whether it was limited to the 'stage' proper."

This court approved Frohman v. Fitch, supra, and upon the authority of Kalem v. Harper, 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, stated that the dramatic rights included motion picture rights, but such a conveyance of dramatic rights to have

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such meaning cannot be narrowed by other limitations. In Klein v. Beach, supra, stage rights only were granted, and this was made plain in the preamble and the provisions of the contract. This court there said in so holding: "In general it is quite clear that this was the prevailing purpose of the parties."

In the case at bar, no distinction is made between the producing rights which the appellant had and those which he conveyed, except where the parties themselves defined it, such as in paragraph 10, to wit, reserving the right to publish the play in book form under conditions there expressed.

We find no error in excluding the contract with Laurette Taylor. This was a contract for the services of Laurette Taylor to perform as a leading female character, not only in this play, but in other plays that might be suited to her talent and ability. It provided for a three-year period with an option of three more. It was no evidence indicating a limitation upon the contract between the parties to this litigation and was properly excluded.

The identity of the person who drew the agreement of January 19, 1912, was unimportant. The contract was bilateral. Responsibility for ambiguity in a contract should be borne by the party who caused it, but there is no ambiguity. It was not important to know the identity of the party who drew the contract.

Holding these views as we do, the decree must be affirmed.

WARD, Circuit Judge (dissenting in part). The grant in the contract under consideration is of an exclusive right "to produce, perform and represent" a play. There has been no judicial construction of any of these words so as to make them technical without reference to the terms of some particular contract. Harper Bros. v. Kalem Co., 169 Fed. 61, 94 C. C. A. 429 (Kalem Co. v. Harper Bros., 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285), was not a case of contract but of infringement of copyright, the question being whether a moving picture show was a dramatization of an author's work. In Frohman v. Fitch, 164 App. Div. 231, 149 N. Y. Supp. 633, the exclusive right to "produce" a play was construed in the particular contract to cover moving picture rights, whereas in Klein v. Beach, 239 Fed. 108, 151 C. C. A. 282, we held the grant of an exclusive right to "produce, perform and represent" a play "on the stage" did not cover moving picture rights. The other words "perform and represent" in that contract and in the contract now under consideration have appeared in our Copyright Act since 1870 (U. S. Rev. Stat. 4966), long before moving picture shows were dreamed of. Therefore the question is: When the parties used the words "produce, perform and represent" the play, what were they intending to cover by those words? It seems to me perfectly plain from the contract that they were intending to cover the spoken play only and, if so, the words they used, however large, must be confined to the thing they were contracting about.

The third article of the contract speaks of theatrical seasons, which exist for spoken and do not exist for movie plays.

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The fourth article provides for royalties on the gross weekly receipts of the box office, which was held in Harper Bros. v. Klaw (D. C.) 232 Fed. 609, 612, to be inapplicable to "any method of photoplays in commercial use or known to witnesses or counsel." The trial judge refused to permit the plaintiff, over his objection and exception, to prove this fact.

The fifth article refers again to theatrical seasons.

The sixth article provides for the production of the play in first class theaters and on the road with Miss Taylor in the title rôle, which applies in my judgment to the spoken play only.

The eighth article provides that the rehearsals and productions shall be under the author's direction, which does not apply to movie shows.

The eleventh article provides that should the play fail in New York or on the road it should be released to stock theaters, which applies to the spoken play only.

On the other hand, I find not a word in the contract indicating an intention to transfer the movie rights though they were perfectly well known by both parties. Therefore though the words of the grant are large enough to cover them, I think the words are to be restricted to what the parties were contracting about, viz., the spoken play.

(258 Fed. 562)

UNITED STATES v. BIRMINGHAM TRUST & SAVINGS CO.

In re STANDARD HOME CO.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1919.)

No. 3304.

1. BANKRUPTCY ⇐328—CLAIMS OF UNITED STATES.
The United States may present a claim in a bankruptcy case at any time while the bankruptcy is pending and the funds thereof are not distributed.

2. BANKRUPTCY ⇐315(1), 317—CLAIMS PROVABLE—"PENALTY"—COSTS.
A fine adjudged against a corporation on its conviction for using the mail to promote frauds, under Criminal Code, § 215 (Comp. St. § 10385), is a "penalty," within the meaning of Bankruptcy Act July 1, 1898, § 57j (Comp. St. § 9641), not provable in bankruptcy; but the United States is entitled to prove all the costs which it paid or incurred in the prosecution as a pecuniary loss sustained by it (citing Words and Phrases, First and Second Series, Penalty).

Walker, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

In the matter of the bankruptcy of the Standard Home Company. Petition by the United States that an order be made requiring the Birmingham Trust & Savings Company, as trustee of the bankrupt estate, to pay the amount of a fine and costs adjudged against the bankrupt on its conviction under an indictment. From a decree deny-

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ing the petition, the United States appeals. Reversed and remanded, with instructions.

This is an appeal from a decree denying the prayer of a petition of the United States that an order be made requiring the trustee of the bankrupt estate of the Standard Home Company, a corporation, to pay the amount of the fine and costs adjudged against that corporation on its conviction under an indictment against it charging a violation of section 215 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. § 10385]). The cause was submitted on an agreed statement of facts, which disclosed the following:

A verdict of guilty of the charge mentioned was rendered on the 20th day of February, 1915, whereupon, on motion of the defendant in that case, the imposition of the sentence was deferred until the 24th day of February, 1915, on which day, that defendant having filed a motion for a new trial, on its motion the hearing of the motion for a new trial and the imposition of the sentence were postponed to March 20, 1915. On February 22, 1915, that defendant, not having sufficient property to pay all its debts, executed a voluntary assignment of all its property for the benefit of all its creditors. On the same day a petition in bankruptcy was filed against that corporation by certain of its creditors. On the 2d day of March following that corporation was duly adjudged to be bankrupt. On March 20, 1915, the motion for a new trial in the criminal case was overruled, and the defendant corporation was sentenced to pay a fine and the costs of the prosecution. A writ of error to obtain a review of that judgment was sued out, which resulted in an affirmance by this court on October 4, 1917.

On May 15, 1915, the appellee, the Birmingham Trust & Savings Company, was duly elected and appointed as trustee of said bankrupt estate, and is still performing the duties of such trustee. The taxed costs of the prosecution of the above-mentioned criminal case amount to the sum of $9,024.25. No part of the fine or costs has been paid. Before the filing of the petition in this proceeding the United States demanded of said trustee in bankruptcy the payment of said fine and costs. The trustee failed and refused to pay the same, or any part thereof. The trustee now has, and at all times since its appointment as such trustee has had, in its possession and control, assets of the bankrupt greatly in excess of the amount necessary to pay said fine and costs, together with all taxes legally due and owing by the bankrupt to the United States, state, county, district, and municipality, and all debts given priority by subdivision "b" of section 64 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [Comp. St. § 9648]).

The record discloses the claim of the United States in this case was first presented to the referee, who rejected the same as not provable in bankruptcy. Then, on review, the District Judge in an elaborate opinion affirmed the report of the referee disallowing the claim. From that decision the appeal in this case is taken, and the following errors assigned:

"A. The District Judge erred in his order disallowing and expunging the claim of the United States to have said fine paid as a claim entitled to priority.

"B. The District Judge erred in his order disallowing and expunging the claim of the United States to have said costs paid as a claim entitled to priority.

"C. The District Judge erred in his order disallowing and expunging in toto the claim of the United States to have said fine paid by the trustee in whole or in part as the law might require.

"D. The District Judge erred in his order disallowing and expunging in toto the claim of the United States to have said costs paid by the trustee in whole or in part as the law might require.

"E. The District Judge erred in his order holding that petitioner was not entitled to priority of payment either as to the fine or costs of said prosecution.

"F. The District Judge erred in his order that the United States was not entitled to a payment of said fine ratably with other creditors.

"G. The District Judge erred in his order that the United States was not

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entitled to a payment of the costs accruing before bankruptcy ratably with other creditors.

"H. The District Judge erred in his order that the United States was not entitled to a payment of the costs accruing after bankruptcy ratably with other creditors.

"I. The District Judge erred in his order disallowing and expunging said claim of the United States.

"J. The District Judge erred in his order that the claim of petitioner as to the fine fell within section 57j of the Bankruptcy Act.

"K. The District Judge erred in his order that the United States must prove its claim in the common form to get the benefit of section 57j of the Bankruptcy Act.

"L. The District Judge erred in his order that the United States could not prove its claim to an allowance under section 57j of the Bankruptcy Act after the expiration of one year.

"M. The District Judge erred in his order that the procedure adopted in this matter by the United States was not a sufficient proof of its claim to secure the benefit of section 57j of the Bankruptcy Act."

Oliver D. Street, Sp. Asst. U. S. Atty., of Guntersville, Ala.

John P. Tillman and Wm. Bew White, both of Birmingham, Ala., for appellee.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PARDEE, Circuit Judge (after stating the case as above). [1] The right of the United States to present a claim in a bankruptcy case at any time while the bankruptcy is pending and the funds thereof are not distributed cannot be disputed.

[2] The right of the United States to claim priority under section 3466, R. S. (Comp. St. § 6372), was unquestionably modified and restricted by section 57j of the Bankruptcy Act (Comp. St. § 9641). Guarantee, etc., Company v. Title Guaranty, etc., Company, 224 U. S. 152–160, 32 Sup. Ct. 457, 56 L. Ed. 706. And see Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174. Section 57j of the Bankruptcy Act reads as follows:

"Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Under the provision of this section it seems clear the right of the United States to claim the penalty or a forfeiture is denied, except as to the actual pecuniary loss suffered by the United States. The fine of $1,000 claimed in this case is unquestionably a penalty. C. C. § 215. See Words and Phrases, vol. 6, verbo "Penalty"; United States v. Reisinger, 128 U. S. 398, 9 Sup. Ct. 99, 32 L. Ed. 480. As there is no question or suggestion that in the matter of this penalty the United States suffered any pecuniary loss, it cannot be allowed.

As to the costs claimed, a different question is presented, to wit, for the pecuniary loss suffered by the United States in the prosecution and conviction under which the penalty was inflicted. The suggestion made that the costs incurred in such prosecution should be in-

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cluded as a part of the penalty, because when awarded the matter was in the discretion of the court imposing the penalty, does not seem to need consideration. Under the showing made the United States suffered pecuniary loss in all the costs of the case which they paid or incurred in the prosecution of the suit.

The judgment appealed from is reversed, and the cause is remanded, with instructions to permit the United States to prove all their pecuniary loss as charged.

WALKER, Circuit Judge (dissenting). I concur in the conclusion that the decree should be reversed, but not in the conclusion that the claim asserted is not entitled to priority, so far as the amount of the fine adjudged against the bankrupt is concerned.

The question is: Was it intended by section 57j of the Bankruptcy Act to deal with such penalty as the one imposed on the bankrupt corporation following its conviction of the criminal offense charged against it? The language of the provision, considered in the light of the connection in which it was used and of the previously existing law, which was not expressly repealed or modified, furnished some basis for an inference that the subject intended to be dealt with was debts due as penalties or forfeitures arising out of an act, transaction, or proceeding in which creditors of a class mentioned had some pecuniary interest, and that the object was to limit the amount allowable to such a creditor out of the debtor's estate in bankruptcy to the amount of the pecuniary loss sustained, whatever may be the amount of the penalty or forfeiture incurred. The claim asserted in this case is not based on a forfeiture. It is based on a judgment assessing a fine and costs on conviction of a criminal offense. The transaction out of which such penalty arose was one which did not affect the claimant in a pecuniary way. It was the crime of using the mails in the execution of a scheme to defraud parties other than the United States. The language of the provision is such as to indicate that it was assumed or presupposed that the act, transaction, or proceeding referred to is one in which the beneficiary of the penalty or forfeiture has a pecuniary interest. The effect of the provision is to limit the amount allowable to such beneficiary out of the debtor's estate in bankruptcy.

To say the least, it is not made clear that a penalty for criminal misconduct, at any rate such misconduct as does not pecuniarily affect the party entitled to enforce the penalty therefor, was in contemplation. Penalties may be divided into two classes, namely: First, such as are prescribed to secure compliance with pecuniary or contractual obligations; and, second, such as are imposed for breaches of duty without regard to pecuniary loss resulting from such breaches to the party entitled to enforce the penalties. It is not uncommon for a penalty or forfeiture incurred by a violation of a contractual or pecuniary obligation to the United States, a state, a county, a district, or municipality, to subject the party in default to greater loss or damage than the breach caused to the party in whose favor the obligation was incurred. An effect of the above-quoted provision of the

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Bankruptcy Act is that debts so owing to the public bodies mentioned are not allowable out of the debtor's estate in bankruptcy, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with costs and interest, though the penalty or forfeiture incurred may have entitled the beneficiary of it to recover more from the debtor if the latter had not been adjudged bankrupt. The provision is one determining the extent to which claims of a stated class are allowable. The terms of it being such as to indicate that it was intended to deal with penalties and forfeitures arising out of acts, transactions, or proceedings involving some pecuniary loss to the parties entitled to enforce such penalties or forfeitures, there is some basis for an inference that penalties otherwise arising were not in contemplation. In the absence of a clear expression of a legislative intention to repeal or modify the provision contained in section 3466 of the Revised Statutes, it is not to be implied that that provision was repealed or modified by the subsequently enacted statute, except in so far as the latter is plainly inconsistent with the former.

In some respects the priority given by section 3466 of the Revised Statutes to debts due to the United States is affected by the Bankruptcy Act. Section 64 of the latter act subordinates debts due to the United States, other than taxes legally due and owing, to certain payments required to be made in full, in the order prescribed, out of the estates of bankrupts. Guarantee Co. v. Title Guaranty Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706. Section 57j modifies the priority as it existed previously by limiting payments of the class of debts stated to the amount of the pecuniary loss sustained by the creditor, costs, and interest. The priority, as it previously existed, is not affected except by express words to that effect. United States v. Herron, 20 Wall. 251, 22 L. Ed. 275. A debt due to the United States is not required to be proved in bankruptcy. It may be enforced out of the bankrupt's estate without a compliance with requirements applicable to other claims against the bankrupt. Lewis, Trustee, v. United States, 92 U. S. 618, 23 L. Ed. 513; Collier on Bankruptcy (11th Ed.) 990. The judgment in question for the fine and costs is a debt due to the United States. 13 Cyc. 398. If section 57j of the Bankruptcy Act has the meaning attributed to it in behalf of the appellee the United States has no priority at all with reference to the penalty adjudged, as that penalty arose out of conduct involving no pecuniary loss to the United States. Under the construction contended for, the convict's bankruptcy, instead of giving rise to a priority as to the amount adjudged, would have the effect of depriving the United States of any priority at all. The government's position would not have been better if the judgment of conviction had been rendered before the bankruptcy. As the penalty awarded by the judgment arose out of the commission of the crime, there would have been no right to have the amount adjudged given any priority, if priority is limited to the amount of a pecuniary loss caused by the commission of the crime to the party in whose behalf the penalty was enforced, as no such loss was sustained.

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Not even the costs adjudged can be regarded as a pecuniary loss sustained by the commission of the crime out of which the penalty arose, as they arose, not out of the commission of the crime, but out of the prosecution for it. As so construed, the provision in question would have the effect, so far as the convict's estate in bankruptcy is concerned, of subordinating such a claim as the one asserted to debts of the bankrupt not belonging to any class to which priority is expressly given. In effect that would be the same thing as making the convict's estate in bankruptcy exempt from the payment of a debt owing as a penalty arising out of a crime not involving pecuniary loss to the party in whose favor the penalty was adjudged. A construction leading to such results is not to be adopted if, consistently with the language used in the provision in question, it may be given a meaning not involving such consequences. The language of section 57j of the Bankruptcy Act is not such as to call for the conclusion that so complete a reversal of the policy evidenced by section 3466 of the Revised Statutes was intended to be effected. The first-mentioned provision is given a field of operation within a meaning fairly attributable to its language, if it is held to have reference only to debts owing as a penalty or forfeiture prescribed as a means of preventing pecuniary loss. It fairly may be regarded as evidencing a policy of protecting the creditors at large of bankrupts by making such a debt allowable only for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with costs and interest, without affecting whatever priority previously existing law gave to a debt due as a penalty or forfeiture not prescribed as a means of preventing pecuniary loss.

For reasons above indicated, the conclusion of the writer is that section 3466 of the Revised Statutes is still effective to give such priority as was claimed to such a demand as the one asserted.

(258 Fed. 567)

FITTER et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 214.

1. CRIMINAL LAW ⊕1129(2)—APPEAL—ASSIGNMENTS OF ERROR.
The record should not be burdened with dragnet assignments of error the purpose of the rule requiring assignments of error being to enable the court and opposing counsel to see on what points reversal of a judgment is sought and to limit discussion to those questions.

2. CRIMINAL LAW ⊕718—TRIAL—ARGUMENT.
Language that might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi judicial officer, and whose duty it is to act in the interest of justice; so where a prosecuting attorney's appeal for a conviction is upon considerations which have no legitimate bearing on the case, and which the jury have no right to consider, a conviction should be reversed unless it is apparent that no possible harm has resulted.

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8. CRIMINAL LAW ⟸1171(1)—APPEAL—HARMLESS ERROR—ARGUMENT.
In a prosecution for conspiracy to defraud the United States, argument of counsel for the United States, in so far as it appealed for a conviction on improper grounds, *held* harmless, in view of the overwhelming evidence of defendant's guilt.

4. SEARCHES AND SEIZURES ⟸7—WITNESSES ⟸298—PRIVILEGE OF ACCUSED—UNLAWFUL SEARCHES.
Under Const. Amend. 4, declaring against unreasonable searches and seizures, and Amend. 5, declaring that no person shall be compelled to be a witness against himself, it was an arbitrary and unlawful violation of defendant's constitutional rights for officers of the secret service to demand from his wife ledgers and delivery slips for use as evidence in a prosecution for conspiring to defraud the United States, and, where the wife delivered the same on demand, such documents are inadmissible in evidence.

5. CRIMINAL LAW ⟸1166(1)—APPEAL—CONVICTION—HARMLESS ERROR.
Though a seizure of defendant's ledgers without warrant was a violation of the rights guaranteed by Const. Amends. 4, 5, a conviction will not be reversed where neither the ledgers nor their contents were admitted in evidence, and witnesses were not allowed to testify as to information derived therefrom, etc.

6. CRIMINAL LAW ⟸1165(1)—HARMLESS ERROR—EVIDENCE—VIOLATION OF CONSTITUTIONAL RIGHTS.
Though the seizure of defendant's ledgers and books was an invasion of his rights guaranteed by Const. Amends. 4, 5, the introduction in evidence by defendant of the only pages in the ledger examined by the United States Attorney cured the error, if any existed, based on their having been for a time in the custody of government agents.

7. CRIMINAL LAW ⟸730(1)—CONDUCT OF COUNSEL—ACTION OF COURT—HARMLESS ERROR.
Where it was doubtful whether the jury heard an alleged improper remark by the prosecutor, who consented that it should be stricken, and the court instructed them if they heard it to disregard it, the error was harmless.

8. WITNESSES ⟸48(1)—COMPETENCY—CONVICTION OF CRIME—WITHDRAWAL OF PLEA OF GUILTY.
It was the judgment of conviction of an infamous crime which at common law made the convict incompetent as a witness; hence defendant cannot complain that two of those indicted with him who had pleaded guilty were allowed to withdraw their pleas and permitted to testify, though they had confessed themselves guilty of a felony.

9. WITNESSES ⟸48(1)—COMPETENCY—CONVICTS.
The testimony of persons convicted of crime is admissible in the federal courts, and the conviction goes simply to the credibility and weight of their testimony.

10. WITNESSES ⟸52(1)—COMPETENCY—TESTIMONY OF WIFE FOR HUSBAND.
In a prosecution for conspiring to defraud the United States, the fact that the trial court declined to allow defendant's wife to testify, on the ground that the competency of witnesses in a criminal case is governed by the common-law rules in force when Judiciary Act 1789 was passed, is no ground for reversal.

11. CRIMINAL LAW ⟸520(1)—EVIDENCE—CONFESSIONS.
In a prosecution for conspiring to defraud the United States, confessions made by alleged coconspirators to a naval intelligence officer, who stated that it was the best thing for such persons to tell the truth, cannot be excluded as involuntary where no inducements were held out.

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12. CRIMINAL LAW ⊜368(1), 423(1)—EVIDENCE—ACTS AND DECLARATIONS OF COCONSPIRATORS.

Where two or more persons were associated for the same illegal purpose, any declaration or act of one of the persons in reference to the common object is admissible, when they are in furtherance of the common object or constitute a part of the res gestæ.

13. CRIMINAL LAW ⊜780(4)—INSTRUCTIONS—ACCOMPLICE'S TESTIMONY—CORROBORATION.

In a prosecution for conspiring to defraud the United States, where the jury had been charged that the testimony of confederates and accomplices should not be accepted unless corroborated, a further charge that the confessions of such confederates might be considered as corroboration was improper, allowing the confessions of his alleged co-conspirators which were not in furtherance of the conspiracy to be used against defendant.

In Error to the District Court of the United States for the Eastern District of New York.

John Fitter and others were convicted of conspiring to defraud the United States, and the named defendant alone brings error. Reversed.

O'Gorman, Battle & Vandiver, of New York City (George Gordon Battle and Rogers B. Wood, both of New York City, of counsel), for plaintiff in error.

James D. Bell, U. S. Atty., of Brooklyn, N. Y. (Vine H. Smith, Sp. Asst. U. S. Atty., of counsel), for the United States.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff in error, hereinafter called the defendant, was indicted with five others for having conspired to defraud the United States. They were all tried together, and all were found guilty. The defendant Fitter was sentenced to imprisonment at Atlanta for one year and nine months and to pay a fine of $5,000.

[1] He alone has sued out a writ of error, and there are 62 assignments of error, which occupy 12 printed pages of the record. We think this a good occasion to call attention of counsel to what the Supreme Court has said on several occasions in reference to the practice of burdening the record with dragnet assignments of error. In Phillips & Colby Construction Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341, the assignments of error were 10 less than the number found in this case, and the court said:

"The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the plaintiff's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points. This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on. We can only try to respond to such points made by counsel as seem to be material to the judgment which we must render."

In Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252, the court recurred to the subject again, quoting from the earlier case which we have cited.

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The practice condemned is not conducive to the better administration of the law, and embarrasses, rather than promotes, the cause of justice.

The defendant at the time the alleged conspiracy was formed was a dealer in supplies and provisions in the borough of Brooklyn. Two of his codefendants were employés of the United States in the service of the Navy Department at the City Park Barracks in Brooklyn, where it was their duty to examine and check incoming supplies purchased by the United States government for delivery at the City Park Barracks, and to issue receipts for the provisions and supplies, and to report the amount of the same to the paymaster in the United States Navy Yard so that he might be informed of the payments proper to be made by him from the funds of the United States in his custody. Three other of the codefendants were employés of the defendant, whose duty it was to drive the defendant's trucks.

The conspiracy alleged was that defendant should agree to sell and deliver provisions and supplies to the United States for the use of the Navy Department, and that only a part of such provisions and supplies should be actually delivered, and that it should be made to appear by the issuance of false receipts that such provisions and supplies had been delivered and were in the possession of the department.

Two of the codefendants who were in the service of the Navy Department, and who had issued false receipts showing the delivery of greater quantities of butter, eggs, meat, and poultry than were received, pleaded guilty and gave testimony on behalf of the government. The alleged method which the conspirators adopted was for the defendant to have the correct quantity of provisions brought to the Navy Yard on defendant's trucks, and then, after receipts had been issued purporting to show the delivery of the entire quantity, the drivers were permitted to carry back to defendant's store substantial portions of the supplies for which receipts had been issued. Three other codefendants, drivers of Fitter's trucks, confessed to the frauds perpetrated, and their sworn confessions were introduced in evidence at the trial.

The testimony in the case, if the jury believed it, certainly proved by overwhelming evidence the guilt of the defendant. The government claims that it not only proved its case beyond a reasonable doubt, but proved it beyond any possible doubt.

[2, 3] The defendant seeks a reversal, and he raises certain objections to the indictment, and to rulings of the court, and to parts of the summing up of the attorney for the prosecution. In a case where the evidence of guilt is so overwhelming, the objections of the defendant must be serious and clearly prejudicial to justify the court in reversing the judgment and compelling the government to put this man again on his trial.

The defendant mainly relied in his effort to obtain a new trial upon certain remarks addressed to the jury by the Assistant United States Attorney in his summing up. The remarks complained of are the following:

"You have got your duty to do, and I have got my duty to do, and your work is just as sacred and just as dear to your country as the man who is

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over in France to-day and fighting that fight from the front; that it would be unworthy for me to mention the name of my country and your country in the prosecution of this case. I do not think he meant that, because he is a better American than that. Why, this contract, gentlemen, that is distinctly a war contract. This, gentlemen, is a contract that was founded and entered into for the only purpose of helping us in the prosecution of this great world war"—

At this point counsel objected, and a colloquy between counsel ensued, and at its close counsel for the government resumed, saying:

"Gentlemen, these facts are given you for your consideration so that you may, in your integrity and upon your oaths as jurymen, do your duty as you see it. We who are not on the battle-lines are here in this country enjoying peace; enjoying all those liberties that only men who are allowed to do business and make a profit while the war is going on on the other side; but I say to you, gentlemen, woe be to the vulture that uses as his carrion the profits derived by illegal sale of the government's goods."

Here counsel for defendant renewed his objection on the ground that it was an appeal to the passion and prejudice of the jury. Then followed another short colloquy between counsel, and counsel for the government appealed to the court that he be permitted to draw his own inferences of the testimony that had been adduced. Whereupon the court observed:

"Gentlemen, you will so understand."

And counsel for defendant excepted.

Later on in his argument counsel for the government said:

"Gentlemen, this does hurt, I know; but I want it to hurt. I want it to go right down to the heart of these men. I want them to feel it as I feel it, gentlemen. Think of your children now trying to sell Thrift Stamps as my children and some of your children are, stopping people on the highways to help in the successful prosecution of this great war. Think of you. Think of me. Think of these men in the courtroom, going to their theaters or places of amusement to-night, and listening to some speaker to-night asking them to buy Liberty Bonds, and think of some thief that would steal the money that you put into that Liberty Bond in order to make the war a success, and ask yourselves the question: Is this prosecution under these circumstances just, and have I the right to expect a verdict in this case of guilty as charged in the indictment? What is the country, gentlemen? Is the country that we live in—is it these buildings; is it the shores of California, with its wonderful, velvety grass; is it the mountains; is it the material that we use to fight the terrible Hun with and barbarian; is it the guns; is that our country? Why, no. You are what we call our country. The men in the courtroom. The human beings that go to make this country what it is. That is your country. I tell you that when men violate this law at this time, and they come before twelve honest, intelligent jurors, and we give them the fair trial that they have had, we give them everything that they are entitled to. We say, this shall not continue, because it is the wrong, thieving crime that will hinder or delay the uplift of a great world and make it a better place to live in, and must be stamped out in its inception; and let us say as we leave the courtroom tonight that no contractor in this district, or anybody that does business with the government, will do it hereafter, except on the level, because we are going to make our verdict ring true and clear in the ears of every contractor."

Counsel for defendant again interposed on the ground that it was an appeal to the prejudice and passion of the jury, and he asked for

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the withdrawal of a juror on the ground that the jury may have been prejudiced. The court denied the motion, and an exception was taken.

The court in instructing the jury charged:

"I expressly charge you that you are to disregard any remarks of counsel made throughout the trial, or during the summing up, so far as they may affect your verdict, because your verdict can only be reached upon the evidence itself as presented at the trial."

On the argument in this court counsel asserted that the remarks were such as to preclude the possibility of a fair and impartial trial. It was also urged upon us as quite probable that the appeal to render a verdict from patriotic motives might have had a greater effect upon the jury than the evidence presented by the government.

In Dunlop v. United States, 165 U. S. 486, 498, 17 Sup. Ct. 375, 379 (41 L. Ed. 799), the Supreme Court, having under consideration certain remarks alleged to be improper and which were made by counsel in his address to the jury, said:

"There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation."

There are numerous cases in which courts have deemed it necessary to set aside verdicts because of prejudicial and improper remarks made by counsel in arguments addressed to juries. We shall not undertake to refer to them even by mere citation. We may observe, however, that the courts have said that language might be permitted to counsel in summing up a civil action which could not with propriety be used by a public prosecutor, who is a quasi judicial officer representing a state or the United States, as the case may be, and whose duty it is to act impartially in the interest only of justice. People v. Fielding, 158 N. Y. 542, 547, 53 N. E. 497, 46 L. R. A. 641, 70 Am. St. Rep. 495. Prosecuting attorneys should be careful not to depart from their line of duty, and it is the plain duty of the trial court not to allow an appeal to be made to a jury for a conviction upon considerations which have no legitimate bearing upon the case and which the jury would have no right to consider. And where this duty has not been performed it is the plain duty of the appellate court to set aside the judgment unless it is convinced that no possible harm has resulted.

In Chadwick v. United States, 141 Fed. 225, 245, 72 C. C. A. 343, 363, Judge Lurton, speaking for the Circuit Court, said:

"There is a degree of liberty allowable to counsel, whether for the government or the accused, in respect to the line of argument they shall pursue and the inferences to be drawn from the evidence, which a trial judge should respect until the facts of the case are overstepped or arguments used which plainly abuse the privilege. But when facts not in evidence are stated to the jury or arguments advanced plainly not justified by the evidence, and calculated to arouse prejudices incompatible with even-handed justice or an orderly

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course of procedure, it is the right and privilege of the counsel for the accused to object and ask the interference of the court, and to except when the court denies the appeal. But to entitle the accused to a reversal when objection is made and the language not withdrawn, it must appear that the matter objected to was plainly unwarranted and so improper as to be clearly injurious to the accused."

He added:

"It cannot be seriously claimed that the argument and influence of counsel complained of were so grossly unwarranted and improper as to be palpably injurious to the accused. Unless this does appear, a reviewing court should not reverse upon such an assignment of error."

The language complained of in the case now before the court is certainly no more objectionable than that complained of in Diggs v. United States, 220 Fed. 545, 555, 136 C. C. A. 147, 159. In that case the Circuit Court of Appeals in the Ninth Circuit declared that they discovered nothing "so offensive or inflammatory in the remarks of counsel for the government as to require us on that ground to reverse the judgments."

The cases show that a prosecuting officer, while he may not appeal either to the fears or the vanity of a jury, and so seek to coerce or cajole them into a verdict of conviction, and in this case he did neither, may legitimately appeal to them to do their full duty in enforcing the law. In so far as counsel went beyond that legitimate appeal we are not inclined upon this record to say that the defendant was prejudiced so that the verdict should be set aside. If the evidence of guilt was less overwhelming, and any possible and reasonable doubt of guilt existed, there would be better reason for asking the court to reverse; but, in view of the evidence which we find in the record, we do not deem it proper, in the due administration of criminal justice, to reverse the judgment on the ground assigned.

[4] The defendant claims that he was forced to furnish incriminating evidence against himself, and that he has been convicted upon evidence secured in an unlawful and illegal manner and in violation of his constitutional rights. It appears that, acting under instructions given by the United States Attorney or his assistant, an officer belonging to the United States secret service came to the defendant's place of business in the absence of Fitter, and demanded that Fitter's wife allow him to examine the ledger, delivery slips, receipts, and check books. This demand was complied with, and certain slips and papers were taken away. An hour later an automobile drove up, and two men entered the store, one of them wore a naval uniform, the other one said he was a secret service agent. They entered the back office and called for "Ledger, ledger, contract ledger." Mrs. Fitter at that time was working on the ledger. The man in uniform grabbed the ledger and carried it out of the store. And as the two left, one of the men said he was going to bring the ledger back after comparing it with the delivery slips. Mrs. Fitter did not see the delivery slips, papers, and contract ledger again, however, until she saw them in the office of the United States Attorney on November 27, 1917.

On November 14, 1917, four days after the illegal seizure of the defendant's ledger and papers, the United States Attorney for the

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Eastern district of New York was requested to return the ledger, and an offer was made to preserve the ledger in its then condition. No attention was paid to this request, and the ledger was not returned.

Thereafter, and before the trial of this action, a motion was made for the return of the ledger, papers, and slips which had been unlawfully seized, and by direction of the court the ledger and some of the papers were turned over by the United States Attorney to counsel for the defendant.

Neither of the men who examined the defendant's books and papers had a search warrant authorizing them to examine or to seize either the books or the papers. The testimony of the officers is that no forcible seizure was made, but that a request was made which was acceded to by Fitter's wife. What was done was undoubtedly an arbitrary and unlawful violation of Fitter's constitutional rights. The Fourth Amendment of the Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides, inter alia, that no person—

"shall be compelled in any criminal case to be a witness against himself."

[5, 6] The defendant relies upon Flagg v. United States, 233 Fed. 481, 147 C. C. A. 367, which was decided by this court. Flagg was arrested charged with having devised a scheme to defraud and with using the mails in furtherance thereof. At the time of his arrest all the books and papers at his place of business were seized by the federal authorities, who retained them in their possession for several years notwithstanding the accused made demands for their return. The papers at last were returned but in the prosecution of Flagg secondary evidence gleaned from the seized documents was received in evidence. This court reversed the conviction on the ground that as the seizure of the papers was illegal, being without warrant, the evidence derived therefrom was incompetent against the accused, and that a conviction based thereon should be reversed. And in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, the court unanimously held it to be reversible error to admit in evidence documents which had been obtained by a marshal without a search warrant.

If the facts in this case brought it within the principle of the Flagg and Weeks Cases it would be clearly the duty of this court to follow the doctrine they announced. But this case is clearly distinguishable from those to which reference has been made. And we are not inclined to extend the doctrine of those cases to the facts of this. The illegal acts of subordinate agents of the United States should not afford to the clearly guilty a means of escape from a just punishment unless conviction has been secured through the use of documents or other evidence containing self-incriminating matter obtained

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by illegal means. That has not been done in this case. The papers and book which the officials of the government took into their possession were not used at the trial by the government or in preparation therefor. The only pages in the ledger examined by the United States Attorney were two, and those were put in evidence by the defendant. Their introduction in evidence by the defendant cured any error, if any existed, based upon their having been for a time in the custody of the government's agents. Finnegan v. United States, 231 Fed. 561, 567, 145 C. C. A. 447.

In the case at bar the trial judge was very particular that no evidence should be received which was derived by the government from any paper or book which the government had taken into his possession by the illegal "seizure." This appears very clearly throughout the trial, but we will refer to but one passage, which sufficiently shows the care of the trial judge in this respect:

"The Court: None of the testimony that you have given, I take it, is based upon information which you acquired from papers seized by the government from the defendant Fitter; is that so?

"The Witness: None whatsoever.

"The Court: Either directly or indirectly; and none of the papers that you produced are papers taken by the government in that way?

"The Witness: None whatever. All are from our own files.

"The Court: At this time I will be very careful to cover this fully with each witness, and I have also instructed the district attorney not to offer any evidence of that sort. Will it not be possible during the rest of the trial for you, or your associate, to direct the attention of the court to any testimony of this sort which you think is being given; otherwise I shall have to caution each witness.

"Mr. Battle: I think, your honor, it would be safer to caution each witness.

"Mr. Beer: At the conclusion?

"The Court: I think it would be better to do so in the beginning, and I shall be obliged to any of you gentlemen to call that to my attention."

Attention is also called to the instruction given to one of the officials of the government, who was one of the officers who was engaged in the seizure of the books. When he was called to the stand to testify the court said:

"Now, Ensign Fitzgerald, you have been called by the United States government to testify at this prosecution against Fitter and others on trial. Some time ago the authorities of the government seized certain books and papers, property of Fitter, and the court directs attention to your testimony. If you acquired any information as the result of any examination you may have made of these papers, or any information that you may have learned indirectly as the result of the contents of those papers, you are to omit all such testimony during your examination.

"The Witness: I see, sir."

And the United States Attorney stated that the book and papers which the government officials illegally took into their possession were of no value in the prosecution of the case and in procuring the necessary evidence.

[7] It appears that during the examination of a witness the counsel for the government asked defendant's counsel whether he had slips which the witness on the stand referred to. The extract from the record follows:

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"Mr. Beer: Have you got those slips?
"Mr. Wood: We object to the District Attorney calling upon the defendant to produce slips, and take exception to it.
"Mr. Beer: I will consent to it being stricken out, and ask the court to disregard the remark at this time.
"The Court: I did not hear the remark. If any juryman heard it, I instruct them to disregard it. The District Attorney has withdrawn it.
"Mr. Wood: The defendant excepts, and insists that the exception go on the record."

The defendant's counsel appears at the trial to have made much of a remark which the court had not heard and which it is doubtful if any member of the jury had heard. In view of the fact that the counsel for the government at once withdrew the remark, and that the court immediately cautioned any juryman to disregard it if he heard it, we do not regard the occurrence as one which would justify a reversal. The circumstances are such as to plainly distinguish the case from McKnight v. United States, 115 Fed. 972, 977, 54 C. C. A. 358, where the demand for the production of an incriminating document was made by counsel for the government acting by direction of the trial judge, and where there was no direction to the jury to disregard the error. The Circuit Court of Appeals in that case said very properly that the compulsory production of a criminating document by the accused when on trial for crime is compelling him to testify against himself within the meaning of the Fifth Amendment to the Constitution.

[8, 9] It is objected that Will and Goodman, who were jointly indicted with Fitter, and were placed on trial with him, but at the opening of the trial withdrew their pleas of guilty, should not have been permitted to testify, having confessed themselves guilty of felony. The common-law rule made a person incompetent as a witness who had been convicted of an infamous crime. In 40 Cyc. 2207, the rule is laid down that "It is not the guilt, but the judgment thereon, which disqualifies the witness; and therefore a person who has not been sentenced is competent, although he has been found guilty of felony, or has pleaded guilty to a charge thereof," citing the cases. And in the case at bar the two witnesses complained of had pleaded guilty, but had not been sentenced at the time their testimony was received. Moreover, the rule in the courts of the United States since Rosen v. United States, 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406, was decided, makes the testimony of persons convicted of crime admissible, and the conviction simply goes to the credibility and weight of their testimony.

[10] It is also objected that error was committed in excluding the testimony of Fitter's wife, who was called to give evidence for the defense. The common-law rule made husband and wife incompetent as witnesses for or against each other in either civil or criminal proceedings. In some of the states the disqualification arising from the relation of husband and wife has been removed by statute, but no statute has been passed on this subject by Congress. In United States v. Reid, 12 How. 361, 13 L. Ed. 1023, the court held that the competency of witnesses in criminal trials in United States courts,

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must be determined by the rules of evidence which were in force in the respective states when the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73) was passed. In Rosen v. United States, supra, the court concluded that "the dead hand of the common-law rule of 1789 should no longer be applied" to exclude the testimony of convicted felons. It may perhaps be said with equal reason that "the same dead hand" should no longer disqualify husband and wife except as respects confidential communications. If the trial judge had permitted Mrs. Fitter to testify, this court would not readily have been inclined to hold that error had been committed. But this judgment of conviction certainly cannot be set aside because the court still adhered to the rule of the common law.

We come now to the consideration of what we regard as the most serious questions which the case presents. The defendant objects to the admission in evidence of confessions alleged to have been made by three of the defendants. This testimony is objected to on the ground that the confessions were obtained by inducements held out by those in authority, and so were not voluntary. It is also objected that the admissions of co-conspirators which are alleged to have been made after the conspiracy came to an end were received in evidence.

[11] The prosecution claims that the confessions were voluntary and that they were not made after the conspiracy was concluded. The evidence that they were not voluntary is based on what was said by one Fitzgerald, an ensign attached to the Naval Intelligence of the United States Navy at the Navy Yard in Brooklyn, and who was questioning the defendants concerning their connection with the alleged offense. The conversation took place prior to their arrest. Fitzgerald's testimony was that he said to defendant Will that Goodman had made a confession implicating himself and Will, and "I want your story from you and the best thing you can do is to tell me the truth." Then he went over to the Navy Yard and found Prager. He told him that he had a couple of confessions that he had been delivering short weights at the City Park Barracks, and that he wanted to have a talk with him. They went into one of the buildings at the Navy Yard, and Fitzgerald testified he said, "Prager, if you have been delivering the stuff at the direction of Fitter, you know the best thing you can do for yourself is to come across." Prager confessed. Then Wittholm was brought in, and the officer said: "Wittholm, we have a confession of George C. Goodman and the chief commissary steward at the City Park Barracks to the effect that they have been receiving money from John Fitter for accepting shortages at the City Park Barracks. Prager has just admitted to me that he delivered goods to the City Park Barracks at the full amount of the consignment signed for, whereas he knew that he only delivered part of it, and you better come across and tell us the truth also, as we know you have been implicated in it." The court asked him to repeat what he said to Wittholm, and his version then was "the best thing that you can do is to tell the truth. You will make it just that much easier for yourself to tell the truth." We think that the evidence shows that Fitzgerald was mistaken in saying that

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he used the words, "You will make it just that much easier for yourself to tell the truth," as will appear as we proceed. Then Katz was brought in and informed that Goodman and Will had confessed and had implicated him, and "we want you to tell the truth; come across and tell the truth." An officer who was attached to the Naval Intelligence Bureau, and who was present at the conversations above detailed and heard them, denied positively that Fitzgerald, who questioned Prager, told him that he "had better come across and tell the truth; it will be easier for you." And he testified that to the best of his knowledge what was said was, "Tell the truth."

Goodman on cross-examination was asked whether Fitzgerald said to Prager, "You had better come across; it will be easier for you." He replied: "I don't remember 'easier.' He said the best thing to do would be to come across and tell the truth." Goodman also testified that he had received no promises from any one.

An assistant paymaster in the navy, who was present when Fitzgerald talked with Prager, testified that he did not hear him say, "You better come across; it will be much easier for you if you do." It is quite unimportant whether the words, "You better come across," were used; for the evidence disclosed that it was a slang expression, meaning to tell the truth.

The defendant Will testified at the trial that no promise whatever had been made to him, and that he did not confess until after he and defendant Goodman had talked the matter over between them, and concluded to make a statement to the United States Attorney a week before the trial began.

The civil and common law regarded differently the question of the admissibility of confessions in evidence. The civil law assumed that an innocent person would not confess to the commission of a crime he had not committed. It therefore regarded confessions as evidence of the most satisfactory kind, and as conclusive evidence of guilt in all cases not capital, unless there was overwhelming proof to the contrary. Domat's Civil Law, § 2086. But the common law took quite a different view of the subject, and was disposed to regard confessions with distrust. At one time the courts in England, as Sir James Fitzjames Stephen in his History of the Criminal Law of England, vol. 1, p. 447, points out, "were disposed to take almost any opportunity to exclude evidence of confessions, almost anything being treated as an inducement to confess. In 1852, however, the law was considerably modified by the decision in the case of R. v. Baldry, 2 Den. 430, since which time the disposition has been rather the other way." The English rules of evidence, incumbered as they originally were with what Stephen calls "all manner of irrational matter," excited the indignation of Bentham, who thought that all objections to evidence ought to be objections, not to its admissibility, but to its weight. And his influence has had much to do with the modification of these rules in England.

In this country our courts have been inclined to take a more liberal view of the subject of confessions than the English courts took.

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In Hopt v. Utah, 110 U. S. 574, 584, 4 Sup. Ct. 202, 207 (28 L. Ed. 262), the court, speaking of the admissibility of confessions, said:

"While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke in Regina v. Baldry, 2 Den. Cr. Cas., 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy."

In Commonwealth v. Chance, 174 Mass. 245, 249, 54 N. E. 551, 553 (75 Am. St. Rep. 306), the court, speaking through Chief Justice Holmes, held certain conversations between an accused person and a police officer voluntary and properly received in evidence, and said:

"We have no disposition to make the rule of exclusion stricter than it is under our decisions. It goes to the verge of good sense, at least."

The rule in regard to the admission of confessions is stated by the Supreme Court in Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, as follows:

"But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * *

"A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted. * * *"

The question, therefore, is whether the testimony already referred to must be considered as amounting to such an inducement or improper influence as should have caused the trial court to exclude the confessions from evidence. We think this question must be answered in the negative.

In Wharton's Criminal Evidence (Ed. 1912) vol. 2, p. 1344, § 647, it is said that "a mere adjuration to speak the truth does not vitiate a confession, when neither threats nor promises are applied."

The same authority in volume 2, § 654, p. 1358, states the law as follows:

"As to admonitions to tell the truth, even where coupled with the statement that to tell the truth is best, it has been held in this country that the confession is voluntary; but in England the words, 'You had better tell the truth,' seem to have acquired a sort of technical meaning, importing a threat or a benefit. As anomalous as it may seem, the explanation is that, while the accused is advised to tell the truth, he supposes that what the authorities mean is that he is to say that he is guilty, and this, coupled with the statement that it would be better to tell the truth, furnishes the temptation to make an unworthy statement, hence an involuntary confession. In this country, however, the weight of authority is that an inducement cannot be implied from the mere exhortation that it is better, or is best, to tell the truth, nor under the advice that if the accused is guilty a confession could not put him in any worse condition, and that he had better tell the truth at all times."

In Sparf & Hansen v. United States, 156 U. S. 51, 55, 56, 15 Sup. Ct. 273, 39 L. Ed. 343 (1895), the accused was told that when the right time came to "tell the truth." And the Supreme Court said

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that "this was not offering to the prisoner an inducement to make a confession. Littledale, J., well observed in Rex v. Court, 7 Car. & P., 486, that telling * * * the truth is not advising him to confess anything of which he is really not guilty. See, also, Queen v. Reeve, L. R. 1 C. C., 362."

In Lucasey v. United States, Fed. Cas. No. 8588a, decided in the Circuit Court for the District of Columbia in 1852, the accused was told "it would be better for him to tell the truth," and thereafter he told where the stolen property was. The court, over objection, had admitted the evidence, and the judgment of the trial court was affirmed. It does not appear whether the person who told the accused that it would be better for him to tell the truth occupied any official relation.

In Hintz v. State, 125 Wis. 405, 104 N. W. 110 (1905), the sheriff said to the prisoner: "You might as well tell the truth, Charlie. I think it would be better for you." The prisoner said: "Do you think it would do me any good?" And the sheriff replied: "I think the truth is always the best." The confession was held properly received. In Roszczyniala v. State, 125 Wis. 414, 104 N. W. 113 (1905), the inspector said to the accused, "You better tell the truth about this matter;" and it was held the confession was admissible.

In Huffman v. State, 130 Ala. 89, 30 South. 394 (1900), the officer who arrested the defendant said to him: "If you have stolen the cotton, it will be better for you to tell the truth about it." The court held that this did not render the confession involuntary and inadmissible. And the court cited a number of Alabama decisions to the like effect.

In State v. Habib, 18 R. I. 558, 30 Atl. 462 (1894), an accomplice said to the accused, who was under arrest: "It's no use trying to get out of it; they've got us dead; we have all been arrested, and you might as well tell the truth." The accused then confessed, and his confession was held properly received in evidence.

In State v. Nagle, 25 R. I. 105, 54 Atl. 1063, 105 Am. St. Rep. 864 (1903), a statement made to the mittimus officer by one accused of murder while in custody on the way to jail was held to have been improperly admitted in evidence and to constitute reversible error. The statement was made after the officer had told her that "the truth, whatever that might be, ought to be told; that it was always the best, except where it would be the means of conviction, and that even then he should prefer it if it were his case; * * * that there was ample proof that" the accused had bought the revolver, "and that, having mentioned the place where she bought it, she might just as well say whether or not she bought it." While the court held the admission in evidence of what the woman said was under the circumstances reversible error on the ground that her statement was not voluntary, it declared that "we do not wish to be understood in what we have thus said, however, as deciding that a mere request, advice, or admonition to tell the truth will render a confession induced thereby inadmissible in evidence; for the strong current of authorities, as well as the better reason, is to the contrary. * * * Those

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decisions which have gone to the extent of so holding have certainly gone 'to the verge of good sense, at least.' But where the request or admonition is given in such language and under such circumstances that the prisoner might naturally have understood it as recommending a confession, the confession induced thereby will be inadmissible in evidence."

In State v. Kornstett, 62 Kan. 221, 61 Pac. 805 (1900), the court held that mere advice or admonition to the accused to speak the truth, which does not import a threat or benefit, will not render a confession then given incompetent.

In Rizzolo v. Commonwealth, 126 Pa. 54, 17 Atl. 520 (1889), a subordinate detective told the prisoner that "he had better tell the captain all he knew; that it would be better for him." Later the captain told him: "If you have anything to tell me, in God's name tell me the truth; if not, tell me nothing. * * * I can make you no promise; I cannot even ask you to tell me a word; but I tell you now, anything you say to me I shall use against you. * * *" The confession received under these circumstances was held properly admitted in evidence.

In State v. Anderson, 96 Mo. 241, 249, 9 S. W. 636, 639, the court held a confession admissible, saying that confessions are inadmissible which are forced from the defendant by flattery of hope or torture of fear, adding: "But mere adjurations to tell the truth furnish no ground for excluding them. State v. Hopkirk, 84 Mo. 278." In the Anderson Case the accused was told by one of his guards: "Ed, if you are innocent, stick to it; if guilty, acknowledge it, and it will probably go easier with you."

In State v. Meekins, 41 La. Ann. 543, 6 South. 822 (1849), the court sustained the admissibility of a confession, saying: "The bill discloses nothing impairing the free and voluntary quality of the confession. Neither threat nor promise was made, but it was given on the simple advice of the officer that 'he had better tell the truth.'"

In Heldt v. State, 20 Neb. 493, 30 N. W. 626, 57 Am. Rep. 835, a detective in the guise of a friend told a suspected party that he had consulted an attorney, who said: "He [the prisoner] had better tell the facts of the case and that they would be likely to do him as much good as anything he could do, and that there was no use lying about it, and he had better tell the truth," and the court held the confession admissible.

In State v. Staley, 14 Minn. 105 (Gil. 75) (1869), the court held that a confession made in answer to a question assuming the guilt of the person confessing, or which was obtained by artifice, falsehood, or deception, or procured by a caution to the accused to tell the truth, if he said anything, did not render a confession inadmissible. It was declared that "unless there is a positive promise of favor, made or sanctioned by a person in authority, or the inducement held out is calculated to make the confession an untrue one, I think it may be laid down as a rule based on reason, and deducible by the late authorities, that the confession will be admissible."

The fact that the confessions were made by defendants while they

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were in the naval prison is emphasized by counsel as a matter of consequence in determining the admissibility of the confessions. These men were not at the time under arrest, and were not in a cell or in the prison proper, but in a room used for hospital purposes. In Sparf & Hansen v. United States, supra, counsel contended that a confession could not be voluntary if made while a defendant is imprisoned and in irons under an accusation of having committed a capital offense. The court held otherwise, saying: "We have not been referred to any authority in support of that position." And "confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises."

In Wilson v. State, 19 Ga. App. 759, 769, 92 S. E. 309, 313, the court said: "Telling a prisoner that it will be better for him to tell the truth can hardly, by any process of right reasoning, be interpreted as an invitation to him to make an untrue confession."

[12, 13] We come in conclusion to inquire whether there was error in admitting in evidence the confessions of the codefendants. The general rule was stated in American Fur Co. v. United States, 2 Pet. 358, 365 (7 L. Ed. 450), Mr. Justice Washington speaking for the court. He said that, "where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the res gestæ, may be given in evidence against the others." So in Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289, the court declared that the declarations must be made in furtherance of the common object, or must constitute a part of the res gestæ of acts done in such furtherance. And as this court held in Erber v. United States, 234 Fed. 221, 228, 148 C. C. A. 123, admissions or confessions made after a conspiracy is at an end cannot be received as against a coconspirator. In this case confessions made after the conspiracy was at an end were received in evidence for the purpose indicated in the court's charge to the jury, which was as follows:

"Now, gentlemen, you have also to consider that proof has been offered by the government that the defendants Goodman, Katz, Prager, and Wittholm have made so-called confessions of their participation in this alleged conspiracy; and while the confessions themselves are only to be received by you as evidence against the defendant himself for making the confessions, so far as the confession is concerned, nevertheless the court charges you that that confession is some corroboration of the testimony given by the defendants Will and Goodman where it applies thereto; and it is for you to determine whether there has been produced by the government, and offered in evidence, sufficient corroboration to satisfy you that the testimony given by the defendants Will and Goodman is correct, and that the guilt of the defendants has been established beyond a reasonable doubt."

To so inform the jury, and then immediately add that the confessions might also be used as some corroboration of the testimony given by Will and Goodman, was inconsistent and confusing. The jury had been told that the testimony of Will and Goodman, being the testimony of confederates and accomplices, should not be accept-

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ed unless corroborated. And then they were informed in the portion of the charge above set forth that the confessions might be accepted as some corroboration of the two witnesses, Will and Goodman. This was permitting the confessions to be used against Fitter.

And as the conspiracy was at an end when the confessions were made, they could not be so used. The objection to their admission in evidence was properly taken at the time and the error requires a reversal.

Judgment reversed.

(258 Fed. 583)

PROVIDENT LIFE & TRUST CO. et al. v. FLETCHER et al.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 231.

1. USURY ⊂⊃37—PURCHASE OF CONTINGENT LEGACY.
   A transaction by which a legatee 44 years old, who had been refused life insurance by various companies, assigned an interest in a legacy payable only in case he reached the age of 55 for less than one-tenth of legacy's amount *held* not usurious.
2. WILLS ⊂⊃743—ASSIGNMENT OF LEGACY—GROUNDS FOR EQUITABLE RELIEF —"CATCHING BARGAIN."
   When a well-educated man 44 years old, with independent means, conveys his interest under a contingent legacy for a small fraction of the legacy's amount, the transaction will not be set aside as a "catching bargain," which merely describes that kind of fraud often perpetrated upon young, inexperienced, or ignorant people.
   [Ed. Note.—For other definitions, see Words and Phrases, Catching Bargain.]
3. EXECUTORS AND ADMINISTRATORS ⊂⊃524(2)—SUIT IN FOREIGN JURISDICTION —FEDERAL COURTS.
   Foreign executors, who have filed papers required by Code Civ. Proc. N. Y. § 1836a, may sue in a federal court in New York to recover funds of the estate.
4. EXECUTORS AND ADMINISTRATORS ⊂⊃524(2)—SUIT IN FOREIGN JURISDICTION —FILING LETTERS—NEW YORK STATUTE.
   Code Civ. Proc. N. Y. § 1836a, requiring foreign executors to file copies of letters, is a condition subsequent to a suit, and may be complied with at such time as the court permits.
5. ASSIGNMENTS ⊂⊃43—EFFECT OF WRONG DATE—"FORGERY."
   An assignment dated a year before it was actually made, through a clerical error which has done no harm, is not invalid as a forgery, since a "forgery" consists of the false making or material alteration of a writing which, if genuine, would be of legal effect, and doing so with intent to defraud.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Forgery.]
6. WILLS ⊂⊃743—ASSIGNMENT OF LEGACY—EFFECT ON PRIOR ASSIGNMENTS.
   An absolute assignment of certain rights in a legacy under a specified item of a will did not extinguish rights previously secured through an assignment pledging an interest in legacy under another item of same will.
7. ASSIGNMENTS ⊂⊃46—RECORDING STATUTE—RETROACTIVE CONSTRUCTION.
   The New York statute regulating the recording of assignments of interests in estates is not retroactive.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Provident Life & Trust Company and Catherine Stewart Wood, as executors under the last will and testament of William Brewster Wood, deceased, against Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, and Conrad Morris Braker and Daniel P. Ritchey. Decree for complainants (237 Fed. 104), and defendants Braker and Ritchey appeal. Affirmed.

This action as originally brought by the Provident Company et al., as executors of Wood, was a suit to enforce an assignment of a contingent interest under the will of Conrad Braker, Jr., deceased. The parties defendant are the same as in Brown v. Fletcher, 253 Fed. 15, 165 C. C. A. 35, here as there Fletcher the trustee is a mere stakeholder, and the basis of litigation is another of Conrad Morris Braker's transfers of contingencies under his father's will, in consideration of small cash payments. The decision appealed from is reported in 237 Fed. 104, and the statement of facts prefixed to Judge Learned Hand's opinion is adopted by this court.[1]

Subsequent, however, to the decision just cited, one Ritchey was permitted to intervene, and set up by cross-bill a claim arising as follows: On March 5, 1902, New York Finance Company borrowed from one Banes, trustee under the will of Banes, deceased, $5,000, and executed and delivered to said Banes its promissory note for that amount, bearing interest at 6 per cent. and due February 25, 1905, contemporaneously assigning as collateral to said note, and to said Banes, "all the estate, right, etc., of any kind, form, or description which the said New York Finance Company now has or hereafter may have in the estate of Conrad Braker, Jr., deceased," by virtue of Conrad Morris Braker's assignment of February 25, 1902, to said Finance Company. Thus Banes, trustee, had as security for his $5,000 note what, if Conrad Morris Braker lived long enough, would amount to $35,000, out of the sums coming to him under the fifteenth and sixteenth articles of his father's will.

On August 12, 1907, the Finance Company, "in consideration of a certain agreement dated July 2, 1907," between itself and Banes, trustee, transferred to said Banes absolutely all its right, title, and interest in the estate of Conrad Braker, Jr., deceased, "subject, however, to all existing and prior assignments thereof." The agreement of July 2, 1907, is not in evidence. By mesne assignments, not necessary to enumerate, Ritchey, the intervener, became the owner of whatever Banes, trustee, had by the transactions recited.

Subsequent to the loans to Finance Company, which are the basis for both Ritchey's and the Provident Company's demands, it became legal in New York to record in the office of the appropriate surrogate such transfers of shares in estates as those by Finance Company to Banes and Wood section 32, Personal Property Law (Consol. Laws, c. 41). Thereupon the owners for the time being of what are now the claims of both Ritchey and Provident Company recorded these conveyances, but both the Banes-Ritchey transfers (of 1902 and 1907) were recorded before either of the Wood-Provident Company transfers (of 1903 and 1912).

The intervener Ritchey also showed, or called to the attention of the court, that the "written assignment as collateral security" by Finance Company to Wood, accompanying the note of July 5, 1903, and transferring all Finance Company's "right arising by virtue of the assignment of Conrad Morris Braker of February 25, 1902" (237 Fed. at page 105), purported to be executed March 5, 1902, and was signed by one as president of Finance Company who was not such president on said March 5, but was so on September 18, 1903, when he acknowledged its execution.

On this record, Ritchey then joined with Provident Company in asserting that Finance Company's transaction with Braker on February 25, 1902, was

[1] The report in 237 Fed., on the ninth line from foot of page 105, contains a confusing typographical error. The date July 5, 1912, should read July 5, 1903.

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not a loan, nor tainted with usury, and did render Finance Company absolute owner of Braker's expectations under the fifteenth and sixteenth articles of his father's will to the extent of $35,000; but he opposed Provident Company's claim to $15,000 and interest therefrom, and demanded the whole fund, with its accumulations pendente lite, because:

(1) The transfer accompanying the Wood note of July 5, 1903, is a "forgery."

(2) The absolute conveyance of 1912 to Wood extinguished the note and collateral assignment of 1903, and the Provident Company's claim must stand on the later transfer only; which

(3) Is inferior to the Banes transfers, because later in time of execution, as well as later in date of record; and the statute compels such assignments as these to rank in the order of recording, even though executed and delivered before enactment of the recording act.

Braker urged a defense, as against the plaintiff only, not appearing in Brown v. Fletcher, supra, viz. that plaintiffs were executors of Wood, appointed in the state of Pennsylvania, who had never obtained ancillary letters in New York, and did not comply with section 1836a, Code Civ. Proc. N. Y., until long after suit begun; i. e., at the trial below. The Code section in question permits foreign executors and administrators to sue in New York on producing and filing in the "office of the clerk of the court" a duly authenticated copy of their letters, "in default whereof, all proceedings * * * may be stayed until such duly authenticated copy of such letters shall be so filed."

The trial court overruled all Braker's defenses, and held that out of the whole $35,000 (and interest) arising under the fifteenth and sixteenth sections of the Braker will, Ritchey should be first paid the $5,000 Banes note and interest, then Provident Company et al. should receive the principal and interest of the $15,000 Wood note and interest, and the balance go to Ritchey. Both Braker and Ritchey appeal.

Safford A. Crummey, of New York City, for appellant Braker.

Davis, Donohue, Thompson & Deitz, of New York City (Robert L. Luce and Seward Davis, both of New York City, of counsel), for appellant Ritchey.

Miller, King, Lane & Trafford, of New York City (Perry D. Trafford, Wolcott G. Lane, and Orrin C. Isbell, all of New York City, of counsel), for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] Using the word "usury" with reference to the statutes of New York, it disposes of Braker's major defense to refer to our decision in Brown v. Fletcher, supra. The present transaction shows no insurance procured at Braker's expense, nor any covenant on his part to pay at all events. This leaves the main inquiry one of fact, viz. whether Braker did in form absolutely sell and assign his expectancy, knowing what he did and intending to do it.

On this point it is of no importance whether he liked to sell, or preferred to borrow. Many an act is voluntary in the legal sense, although induced by unwelcome and distasteful circumstances. With the court below we find it amply proven that Braker did sell to Finance Company his expectancies under the fifteenth and sixteenth articles of his father's will, with full knowledge of what he was doing, and intending to do what he did. That he also contemporaneously intended to deny such willingness and knowledge, should he live to be 55 years old, is, we think, also proven, but is quite immaterial, except as a reflection upon Braker's character.

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[2] There remains a renewed appeal to the doctrine of catching bargains. The material facts on this point do not differ from those in the Brown case, except that Braker was about a year older. This doctrine (in so far as it does not rest upon a desire to preserve to the heir the family estate) is but an aid to equity when endeavoring to apply what Justice Bradley called "a principle of law, as well as of natural justice," namely, that "greater consideration and care are due to persons known to be unable to take care of themselves than to those who are fully able to do so." Graffam v. Burgess, 117 U. S. 185, 6 Sup. Ct. 686, 29 L. Ed. 839.[2]

In so far as decisions have been based on judicial desire, confessed or obvious, to preserve and perpetuate family estates, we decline to follow the same, regarding such doctrine as wholly unsuited to our national spirit, and certainly unsupported by any ruling of our highest court.

It having been agreed for a long time that mere inadequacy of price is not enough to set aside the sale of an expectancy, the inquiry always is whether an unconscionable advantage was taken by or through means inequitable, even though legal. Thus "catching bargains" becomes no more than a phrase convenient to describe the kind of fraud often capable of perpetration upon the young, the inexperienced, or the absolutely ignorant. For a good example, see Hallett v. Collins, 10 How. 184, 13 L. Ed. 376. When such circumstances are proven, and it is insisted "that the proceedings were all conducted according to the forms of law," the comment of Justice Bradley (Graffam v. Burgess, supra) is always appropriate. He said:

"Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

But where, as here, the man who in due form sells that which may be much, in consideration of that which is very little, is upwards of 40 years old, of good education, well to do according to any reasonable standard of expenditure, and under no other coercion than that of his own bad habits, we are still agreed that to such a man the doctrine of catching bargains has no application, and neither by reason nor authority are we compelled to assist him in escaping from a predicament of his own creation.[3]

[3, 4] The point that these plaintiffs have not shown a right to sue as foreign executors under Code Civ. Proc. § 1836a, is without substance. The reason for a foreign executor's inability to sue is not that the court cannot hear him, but that he is officially confined to his own jurisdiction. When that disability is removed by the Legisla-

[2] The cases on this subject are, we think, all collated in 11 Corpus Juris, p. 32. See, also, the earlier view that the doctrine is one primarily for the benefit of "an heir expectant." Bouvier's Law Dictionary (12th Ed.) sub nom. "Catching Bargains."

[3] See the treatment of a not dissimilar transaction with a much younger man, per Justice (then Vice Chancellor) Pitney, in Dixon v. Bentley, 68 N. J. Eq. 124, 59 Atl. 1036. The purchasers were the same men who as New York Finance Company dealt with Braker.

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ture, he may address any court sitting within the territorial area of legislative power. Thus the statute of New York in effect entitles these plaintiffs as nonresidents to sue in the courts of the United States. It was so held under similar circumstances in Beaumont v. Beaumont (C. C.) 144 Fed. 288. That the production and filing of the exemplification of letters required by the statute is a condition subsequent to suit, and may be complied with at such time as the court permits, was decided in respect of this particular statute in Lecouturier v. Ickelheimer et al. (D. C.) 205 Fed. 683, which decision we approve.

[5] In respect of Ritchey's effort to exclude Provident Company et al. from all participation in this fund, we are of opinion that the original transfer by way of collateral security to Wood, deceased, was not a "forgery." Counsel seems to use that word rather to indicate invalidity than to accuse of crime, and such invalidity rests wholly upon the admitted or proven fact that an instrument bearing date March 5, 1902, was neither created nor delivered until July 5, 1903. But a forgery (irrespective of any statute) consists essentially in the false making or material alteration of a writing which, if genuine, would be of legal efficacy, and of doing this with intent to defraud. We find as facts that there was no intent to defraud, and that nothing was falsely made. The erroneous date was no more than a draftsman's error, which has done no one any harm. Nor did this document even purport to minimize or interfere with any rights in or belonging to Banes at the date when it took effect, to wit, its delivery on July 5, 1903.

[6] The absolute conveyance to Wood's executors of 1912 did not, and did not purport to, extinguish the rights obtained by Wood through his note and the accompanying agreement of hypothecation. It attempted to make the executors absolute owners of any $20,000 that might accrue under the sixteenth article of the Braker will; but it did not in the least affect their position as pledgee in respect of the fifteenth article. The attempt was idle, because of the earlier assignment to Banes; but Ritchey surely cannot complain of that.[4]

Nor can it be held that Wood's executors unwittingly surrendered what they already had, in consideration of something of no worth after the transfer to Banes of 1907.

[7] The New York statute permitting and regulating recording of assignments of the interests in estates is not retroactive. Such is the general law; it was so held in respect of deeds in this state. Jackson

[4] The collateral assignment to Wood (erroneously dated March 5, 1902) begins with a recital to the effect that Braker had sold to the Finance Company his interest under the sixteenth article of the will to the extent of $20,000; and then in the habendum clause assigns to Wood all the "estate, right, title, and interest" of the Finance Company in the estate of Braker, deceased. In point of fact the Finance Company had an estate under the Braker will in respect of both the fifteenth and sixteenth articles thereof. The plaintiffs pleaded a right to be reimbursed out of the funds arising under both articles. As neither in pleading nor by argument has it been asserted that the conveyance by way of pledge was limited by the recital above mentioned, we do not advert to the point.

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v. Chamberlin, 8 Wend. (N. Y.) 620. It follows that, the transfer by Braker to the Finance Company having been absolute and valid, the conveyances of parts thereof made before the existence of a recording act are enforceable in the order of time of making, and that the decree of the court below was substantially right. It is therefore affirmed, with one bill of costs to the appellees, to be assessed against both appellants.[5]

(258 Fed. 588)

GILSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 215.

1. CRIMINAL LAW ⇐825(2)—INSTRUCTIONS—NECESSITY OF REQUESTS.
Instruction in a conspiracy case that commission of one of the overt acts alleged by one or more of defendants would sustain a conviction, etc., *held* not erroneous, because authorizing a conviction on an overt act not proven, or committed by a codefendant who had been acquitted, where no further instruction was requested.

2. CRIMINAL LAW ⇐1059(1)—REVIEW—EXCEPTIONS IN LOWER COURT.
In a conspiracy case, exception to part of charge stating it would be sufficient if any one or more of alleged overt acts was established *held* insufficient to raise on writ of error question that charge allowed a conviction based on overt act not proven, or committed by a codefendant who had been acquitted.

3. CRIMINAL LAW ⇐844(1)—INSTRUCTIONS—EXCEPTIONS.
Exception to charge in criminal case must be specific, and not general.

4. CRIMINAL LAW ⇐1048—ERRORS NOT RAISED BY EXCEPTION.
While plain error not raised by exception may be noticed on appeal, right to do so will not be exercised, unless it is evident that serious injustice will otherwise result.

5. CRIMINAL LAW ⇐1056(1)—ERROR NOT RAISED BY EXCEPTION—INSTRUCTIONS.
Any error in an instruction in a conspiracy case, claimed to permit jury to consider unproven overt acts, does not authorize a reversal, in absence of an exception, where numerous overt acts were established by evidence.

6. CONSPIRACY ⇐47—EVIDENCE—SUFFICIENCY.
Indirect evidence regarding defendant's participation in a conspiracy to defraud United States, by substituting inferior materials in army service hats, *held* to sustain a conviction.

7. CRIMINAL LAW ⇐1159(2)—REVIEW—QUESTIONS OF FACT.
Where record in a criminal case contains sufficient evidence on part of prosecution to require submission to jury, any reasonable doubt raised by accused's evidence is solely for jury, and will not be re-examined by appellate court.

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[5] As the fund in the trustee's hands is large enough to pay both the Banes and Wood notes, with interest, and leave a surplus to Ritchey, we leave unnoticed, as merely academic, the inquiry whether Ritchey, as Banes' assignee, could not be compelled to stand wholly upon his assignment of 1907, instead of his note plus the assignment of 1907. The court below regarded the 1907 instrument as of no effect at all for lack of consideration. It is certainly arguable that the Finance Company could give away what they owned absolutely, and that they in effect did so; but, as the fund is ample, the order of payment becomes immaterial.

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In Error to the District Court of the United States for the Southern District of New York.

Arthur C. Gilson and Thomas J. Duffy were convicted of conspiring to defraud the United States, and they bring error. Affirmed.

The indictment is against numerous persons and corporations for a conspiracy (Criminal Code [Act March 3, 1909, c. 321] § 37, 35 Stat. 1096 [Comp. St. § 10201]) to defraud the United States. It was charged and proven that several firms and corporations (whose names are of no importance) contracted with the United States, through proper officers of the War Department, to make about a million "service hats" for army use. The several contracts calling for this quantity of headgear were made at divers times between June, 1916, and June, 1917; that is, both before and after the declaration of war by the United States against Germany. The indictment having been severed as to some of the defendants, the earlier contracts became unimportant, when Gilson and Duffy, with two other men, were tried.

Many, if not most of the hats contracted for were made at two factories; one in Peekskill, N. Y., and the other in New Jersey. Gilson was an employé of the United States and inspector at the Peekskill factory; Duffy was similarly employed and stationed at the New Jersey establishment. Their duties were to see that the United States got what it had contracted for, and particularly that the said "service hats" were made of the material (viz. the hair or fur of certain specified animals in certain definite proportions) agreed on in contract and specifications. The two men who were tried with Gilson and Duffy were employés of one or the other of the factories above named.

The fraud alleged to have been the object of the conspiracy, and actually perpetrated according to the evidence, consisted in substituting inferior hair or fur, or deficient quantities of the more expensive qualities of hair, in that mixture of divers sorts of commercial hairs which, when felted, makes "hat-bodies." The result of the fraud was a hat cheaper than, and inferior to, that contracted and paid for.

The evidence for the prosecution tended to show that one John J. Slattery, named as a defendant in the indictment, but who died before trial, was the man most actively concerned in, if not the originator of, this scheme of fraud. He went from one factory to the other, giving directions or making arrangements for the preparation of the inferior hair mixtures above referred to. It was not contended below, nor is it argued here, that the fraud did not occur. The defense of the four men tried was that they were no parties to the scheme, were not aware of any wrong, and were therefore not conspirators with Slattery, deceased, or any one else.

Of the four defendants tried, two were acquitted; Gilson and Duffy were convicted, and brought this writ.

Harrison P. Lindabury, of Newark, N. J., for plaintiffs in error.

Francis G. Caffey, U. S. Atty., and Frank M. Roosa, Sp. Asst. U. S. Atty., both of New York City.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The indictment charges as overt acts eight several happenings occurring at sundry dates between June 26, 1916, and October 1, 1917. None of the overt acts alleged to have taken place in 1916 were proven; most of those not proven being appropriate (if at all) only in respect of the defendants as to whom there had been a severance.

[1-3] In his colloquial charge the learned trial judge called the attention of the jury to the fact that the indictment set forth "some eight overt acts." He described certain of the overt acts aforesaid as to which evidence had been given, and further stated:

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"If one of these overt acts was performed by one of the parties, or one or more of the parties, then that is sufficient under the statute, providing you find there is a conspiracy, to make out the crime as charged."

He also said:

"If any of these overt acts that I have called your attention to, and such others as you may find from the evidence here, were performed by any of the defendants after the conspiracy had been entered into and during the life of the conspiracy, then, gentlemen, that overt act is binding upon them all, because that you may say was an act in furtherance of the conspiracy."

At the close of the charge counsel for the plaintiffs in error took this exception:

"I desire to except to that part of your honor's charge in which you said that it will be sufficient for the purpose of the charge, as against these defendants, if any one or some of the overt acts alleged in the indictment is established."

It is now asserted that under this charge Gilson and Duffy may have been convicted of a conspiracy without the jury's finding as a fact the commission of an overt act by any conspirator; and this is said to follow from the generality of the court's language, which left the jury to fasten upon some overt act that had not been proven, or one performed by a codefendant who was acquitted, as a means or ground for convicting Gilson and Duffy or one of them.

On due request the trial judge might, and doubtless would, have descended into greater particularity in respect of the overt acts charged and proven. But as a general proposition of law the charge was so plainly right as to need no justification; and in so far as it was insufficient, or too general in respect of this particular case or these particular defendants, the exception did not fairly or at all direct the attention of the court to the insufficiency now complained of. The exception was not sufficiently definite to call the court's attention to the particular matter objected to, and give opportunity to correct it. Hindman v. First National Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108. It is the rule that an exception must be specific, and not general (Morse v. Tillotson, 253 Fed. 340, 165 C. C. A. 122, 1 L. R. A. 485), and there is no difference on this point between the civil and criminal side of the court.

[4, 5] While a plain error as to which no exception is taken may be and often has been noticed by this court, our right so to do "will not be exercised, unless it is evident that very serious injustice will result; the right is not lightly to be invoked, in either a criminal or a civil case." Gruher v. United States, 255 Fed. 478, 166 C. C. A. 550. In this instance no injustice was done The evidence was such as to require the submission of the case to the jury, and it is in our opinion a very far-fetched suggestion that the jury might have attached importance to an unproved overt act, when there were so many (far more than the indictment number) of overt acts amply shown by the evidence submitted to them.

Much reliance is placed by plaintiffs in error upon Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232. That case arose

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under the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. §§ 8820–8823, 8827–8830]), and the jury were charged to "consider carefully all the means which the indictment charges" to produce the condition or act denounced by the statute. We think the difference between such an instruction as this and the careful reference of the court below to the overt acts proven is apparent.

In various forms the plaintiffs in error assert that there was no evidence or no sufficient evidence of a conspiracy on their part.

[6] It was undoubtedly a fair question for the jury whether Gilson and Duffy were or were not guilty of no more than stupidity, ignorance, or neglect of duty, or whether they knowingly and willfully assisted in the scheme of Slattery, deceased, to defraud the United States. The evidence on this point was necessarily indirect, as it nearly always is in conspiracy causes. Very rarely do conspirators make an explicit written, or even oral, statement of the nature and object of their agreement.

[7] The jury rendered verdict against these plaintiffs in error, no reasonable doubt was found, and we are not authorized to re-examine that question. The record contains sufficient evidence on the part of the prosecution to require submission to the jury; such reasonable doubt as might have been generated by the evidence for the accused was for the jury alone. Looker v. United States, 240 Fed. 932, 153 C. C. A. 618.

Judgments affirmed.

(258 Fed. 591)

WILLIAMS v. EDWARD GILLEN DOCK, DREDGE & CONSTRUCTION CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1919.)

No. 3256.

1. NAVIGABLE WATERS ⇐19—OBSTRUCTIONS—DUTY.
Any one placing an obstruction such as a breakwater in a navigable lake outside of a much-used harbor is bound to exercise reasonable care for the safety of all persons making use of the harbor, and such duty requires the placing and maintaining of a suitable warning light at night.

2. NEGLIGENCE ⇐55—CONTRACTORS—LIABILITY OF OWNER.
After a contractor has turned over the work and it has been accepted by the owner, the contractor incurs no further liability to third persons; the responsibility for maintaining it and of giving notice or warning of dangers being then shifted to the owner.

3. NAVIGABLE WATERS ⇐19—CONTRACTORS—LIABILITY OF OWNER.
The United States government, which engaged a contractor to construct a breakwater outside the Cleveland harbor, *held* to have accepted the section of the breakwater already constructed, so that the contractor was not liable for the death of one on a vessel which struck the breakwater, due to the absence of warning lights.

4. EVIDENCE ⇐245—ADMISSIONS—STATEMENTS OF GOVERNMENT ENGINEER.
In an action against a contracting company, which was building a breakwater for the government, evidence that the government engineer in charge of the work, after the accident, stated that the government was maintaining a light on the end of the breakwater for the accommodation of the defendant, is admissible only for the purpose of impeaching the tes-

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timony of the government engineer that the section of the breakwater against which the vessel collided had been accepted by the government, etc.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Action by Kathryn Williams, administratrix of the estate of G. A. Williams, deceased, against the Edward Gillen Dock, Dredge & Construction Company, a corporation. There was a judgment for defendant, and plaintiff brings error. Affirmed.

S. H. Holding, of Cleveland, Ohio, for plaintiff in error.

H. D. Goulder and Thos. H. Garry, both of Cleveland, Ohio, for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and WESTENHAVER, District Judge.

WESTENHAVER, District Judge. Plaintiff in error, also plaintiff below, brought this action to recover damages for the wrongful death of one G. A. Williams. A trial to a jury was had, and after all the testimony for both sides had been introduced the District Court, on motion, directed a verdict for the defendant. This action of the court below is the only error assigned.

The decedent was an employé on a lake steamer named Junior. This steamer on the night of May 9, 1915, between 11 and 12 o'clock, as it was entering Cleveland harbor, struck against the inside corner of the east end of the breakwater. As a result the boat sank and the decedent was drowned. This collision of the steamer with the breakwater, it is contended, was due to the absence of any light on or near its east end, and on this hearing counsel for both parties make the answer to the question involved to turn on whether or not the duty rested on the defendant to maintain such a light.

The defendant on July 2, 1914, had made a contract with the proper engineering officer of the United States government to complete the construction of 6,601 feet of the east breakwater extension of the Cleveland harbor, including the east end against which this steamer collided. This work was divided into seven sections, numbered from west to east and from 1 to 7, inclusive; the first six sections being each 1,000 feet in length, and the seventh 601 feet in length. These sections were to be constructed in the order given, from west to east, and work was prohibited on more than two sections in advance of the completed superstructure, except by special permission of the engineer in charge. This engineer, however, directed that the work first to be done should be the completion of the east end in the inverse order stated. By December 1, 1914, not less than 1,800 feet at that end was completely finished, and in such a manner that no further work or labor was required thereon by the defendant under its contract. The contract also provided that acceptance would be made by the engineer on the written request of the contractor, when a continuous length of 100 feet had been completed, as was required, and to his entire satisfaction. A request was made of the engineer in charge

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for an acceptance of the 1,800 feet thus completed, and December 16, 1914, the engineer certified in writing that 1,800 linear feet at the east end had been satisfactorily completed and that the same was thereby accepted.

The contract also required defendant to maintain at its own expense lights and signals required by the engineer or by the regulations of the United States Lighthouse Board. The regulations of the United States Lighthouse Board were not introduced in evidence, and the record does not indicate clearly what specific requirements, if any, the engineer in charge made as to lights during the period of construction. A gas buoy light was, however, maintained by the defendant at the east end of the breakwater from the time it began work until about December 1, 1914, when all construction work on the breakwater was, owing to weather conditions, suspended for the season. The defendant then removed its gas buoy light and stored it on the United States government pier in the Cleveland harbor. Maj. P. S. Bond, the government engineer in charge of this work, established, upon the removal of the gas buoy, a light on the east end of the breakwater. An upright pole with a cross-arm was erected, with devices to raise and lower the light. Thereafter, and until the lake was frozen over, and again as soon as the ice disappeared in the spring, the engineer, and subordinate employés under his direction and control, maintained and took care of this light.

The evidence tends to show that on the afternoon of May, 9, 1915, at about 3 o'clock, these employés filled the lamp, lighted it, and placed it in position; but, in our opinion, there was sufficient evidence to go to a jury tending to show that during the night, and preceding the time of the accident, it was not lighted or burning.

[1] No question seems to be made by counsel for defendant that if, on these facts, a duty rested on defendant to maintain this light after the acceptance by the engineer in charge of the east 1,800 feet of the breakwater, the issues should have been submitted to the jury. This is also our opinion. The lake at this point was used more or less by all kinds of craft plying to points east of Cleveland to enter and leave the harbor. This use of the lake at this point was known to the engineer in charge and to the defendant and its servants. A legal duty, according to well-settled principles of law and numerous cases, was thereby imposed upon any one constructing an obstacle in water thus used to exercise reasonable care for the safety of all persons making use of the harbor, and this duty obviously required the placing and maintaining of a suitable warning light. Casement v. Brown, 148 U. S. 615, 623, 13 Sup. Ct. 672, 37 L. Ed. 582; Harrison v. Hughes (D. C.) 110 Fed. 545, approved and affirmed on appeal (3 C. C. A.) 125 Fed. 860, 60 C. C. A. 442; Wright & Cobb Lighterage Co. v. Snare & Triest Co. (3 C. C. A.) 239 Fed. 482, 152 C. C. A. 360. Defendant, however, contends, and the court below held, that after the completion and acceptance by the engineer in charge of the east 1,800 feet no further duty or obligation rested upon it to guard or protect that end by a warning light, but that all duty in that behalf became thereafter the obligation of the owner, and that in point of fact

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the owner, through its proper officer, assumed this obligation and undertook to perform it.

[2] The general rule of law, subject to certain exceptions not now material to note, is that, after the contractor has turned over the work and it has been accepted by the owner, the contractor incurs no further liability to third persons by reason of the condition of the work, but the responsibility for maintaining it and protecting third persons against danger therefrom, or the use of it in a defective condition, or failing to give notice or warning of dangers to be apprehended from its existence, is then shifted to the owner. This rule of law does not seem to be disputed; in fact, counsel for both parties cite and rely in part on the same cases. See Salliotte v. King Bridge Co. (6 C. C. A.) 122 Fed. 378, 381, 58 C. C. A. 466, 65 L. R. A. 620, writ of certiorari denied 191 U. S. 569, 24 Sup. Ct. 841, 48 L. Ed. 306; Thornton v. Dow, 60 Wash. 622, 111 Pac. 899, 32 L. R. A. (N. S.) 968, and note; Philadelphia, etc., Railroad Co. v. Philadelphia, etc., Towboat Co., 23 How. 209, 16 L. Ed. 433; Richards v. O'Brien, 1 Ga. App. 111, 57 S. E. 907; Erie & Western Transportation Co. v. City of Chicago, 178 Fed. 42, 101 C. C. A. 170.

[3] The considerations relied on by plaintiff to take the present case without this general rule are, as we understand them, that the defendant's construction contract is an entire contract; that the obligation required thereby and also by the general rules of negligence law to maintain signals and lights, such as were required or necessary in the interest of the safety of third persons, continued until the contract was performed in its entirety; that the work had not been fully completed, turned over, and accepted; and that the completion and acceptance of the east 1,800 feet only, even if authorized, did not bring defendant within the protection of the general rule above stated. These contentions are supported by invoking the general rules of law as to what is an entire contract, and certain provisions of this contract, the most material of which are cited in the margin.[1]

[1] 17. *Payments.* Payments will be made monthly on estimates of such stone as has been placed in the work in accordance with the specifications and not included in any prior estimate, except that ten (10) per cent. of the amount of each estimate will be retained until the contract work is fifty (50) per cent. completed, after which the amount of reserve will remain unchanged until the full completion of the contract.

22. *Changes.* No changes in the character of the material or workmanship herein described will be permitted, unless specially authorized by the engineer. Should it be found desirable to materially modify or change the plans or designs of the work, such modification or changes must be embodied in a supplementary contract with the consent of bondsmen, and must receive the approval of the Secretary of War, before becoming effective.

29. *Order of Work.* The work will be divided into sections 1,000 feet in length. These sections will be constructed in order from west to east, as far as the funds provided will fully complete. Work will not be permitted in more than two sections in advance of the completed superstructure, except by special permission of the engineer.

30. *Acceptance and Responsibility.* The contractor will be held responsible for and required to maintain and repair the work until it has been accepted by the engineer in writing. Such acceptance will be made by the engineer on the written request of the contractor, as follows: Each length of 100 feet

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We have examined these provisions and have duly weighed the considerations urged upon us. The change in the order of constructing the sections is, in our opinion, within the authority of the engineer and permitted by the terms of the contract. The engineer in charge is by the contract itself defined to be the contracting officer. He is expressly authorized to make such minor changes in execution of the work to be done as in his judgment may be necessary or expedient to carry out the intent of the contract, provided that the unit cost is not thereby increased. The modifications or changes which he may not make, without a supplementary contract consented to by the contractor's bondsmen and approved by the Secretary of War, are such as materially modify or change the plans or designs or increase the unit cost of the work. A change in the order in which the sections were to be constructed is not a change of the plans or designs and does not increase the unit cost. It is, on the contrary, a minor change in the execution of the work to be done under the specifications. The change was, in the judgment of the contracting officer, expedient in order to lessen the danger of an unfinished obstacle to navigation below the surface of the water at the east end of the breakwater.

An acceptance by him of a part of the work, when completed according to the requirements of the contract and to his satisfaction, is also expressly authorized and is not outside of his authority. Each completed length of 100 feet may be accepted. The severance of such

cohtinuously from the western end, when the same has been completed as herein provided and to his entire satisfaction.

The contractor will be required to maintain at his own expense, the lights and signals required by the regulations of the United States Lighthouse Board, or by the engineer.

35. *Minor Modifications.* The right is reserved to make such minor changes in the execution of the work to be done under these specifications as, in the judgment of the contracting officer, may be necessary or expedient to carry out the intent of the contract: Provided, that the unit cost to the contractor of doing the work shall not be increased thereby, and no increase in unit price over the contract rate shall be paid to the contractor on account of such changes. No change which will materially affect the cost of doing the work will be made and no greater or lesser unit price than the contract rate will be paid, except upon formal written agreement between the parties, approved by the Chief of Engineers and the Secretary of War, as provided in the form of contract to be entered into.

7. If at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification shall involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

10. Until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

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an accepted portion is thus duly authorized, regardless of whether the contract itself is entire or divisible. The force and effect of this acceptance is not, in our opinion, controlled or modified by the reservation of a part of the contract price or the right reserved thereafter and prior to full completion and payment to reject defective work or material, or to require the fulfilling of any of the terms of the contract. This view of the terms of the contract makes unnecessary any discussion of the cases relating to the power and authority of the engineer to change or waive the provisions of a contract. This acceptance was accompanied by a taking of possession of the east 1,800 feet, so far as possession can be taken of such a structure. This possession was accompanied by the assumption thereafter by the engineer in charge of the owner's duty and obligation of constructing and maintaining a warning light. Nothing thereafter remained to be done by the contractor on this east 1,800 feet, and, in point of fact, it thereafter neither did nor was required to do anything. The contractor did not thereafter fail to comply with any requirement of the engineer for maintaining a warning light.

The duty imposed by this contract to maintain a warning light is no greater than the common-law duty. It becomes unnecessary, therefore, to consider whether or not provisions in a construction contract for the safety of third persons are available to them as supporting an action based on negligence. For discussion of this proposition see the following: Consolidated Coal Co. v. Knickerbocker Co. (D. C.) 200 Fed. 840; Harrison v. Hughes (D. C.) 110 Fed. 545, affirmed 125 Fed. 860;[1] Styles v. F. R. Long Co., 67 N. J. Law, 413, 51 Atl. 710, on second appeal 70 N. J. Law, 301, 57 Atl. 448; Williams v. Stillwell, 88 Ala. 333, 6 South. 914; Earl v. Lubbock [1905] 1 K. B. 253. The final solution of the question involved turns, in our opinion, on whether or not the contractor had fully performed his contract as to the east 1,800 feet, and whether or not it had been turned over to and accepted by the owner and possession and control thereof taken by the owner. All this had been done, and, in our opinion, with proper authority and without violating any provision to the contrary.

[4] Two other considerations are urged by plaintiff which call for brief comment. Three witnesses testify that after the accident they called on Maj. P. S. Bond, the engineer in charge, and that he stated to them that the government was maintaining a light at the east end of the breakwater for the accommodation of the defendant. Maj. Bond denies having said that the light was maintained for the accommodation of the defendant and testifies that in point of fact, this east end had been accepted and taken over, and that the light was being maintained by him or his employés on behalf of the government. Inasmuch as Maj. Bond was not, when making this statement, an agent or officer of the defendant, this evidence was admissible only for the purpose of impeaching his testimony and goes only to its weight. Even if it should be regarded as so weakening his testimony as to justify entirely disregarding it, there still remains the supporting testimony of two witnesses to the same effect and none in conflict with it.

When defendant resumed construction work on the other sections

[1] 60 C. C. A. 442.

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about May 21, 1915, 12 days after the accident, this gas buoy light was, at the request of Maj. Bond, towed by the defendant from the government pier to the east end of the breakwater and anchored there. During this time the government was constructing a pier for a harbor light at that point. It remained in this position until a date some time later than the final completion and acceptance of the remainder of the breakwater. Maj. Bond says that the gas buoy light while there was maintained by the defendant, whereas defendant's witnesses say that it was placed there as a loan to the government at the request of Maj. Bond, who offered to pay the expense. This buoy, when once charged with gas, burns for a period of some 300 days at an estimated expense of 15 cents a day. We do not find in these statements anything which modifies or controls the conclusion already expressed. Even if the jury would have been warranted in drawing the inference that the gas buoy was replaced because required by the engineer under the authority of the contract, this would not control the status existing after the original acceptance and taking possession and control, which continued up to and until after the accident.

The judgment of the lower court is affirmed.

(258 Fed. 597)

SALES v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5207.

POST OFFICE ⟸32—FEES—OBSCENE LETTERS.

In a prosecution for mailing an obscene, lascivious, and filthy letter, contrary to Criminal Code, § 211 (Comp. St. § 10381), the letter itself must directly or indirectly disclose its evil character, and it is improper to allow the jury to convict for an undisclosed, unexpressed intent in the mind of accused.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

R. B. Sales was convicted of mailing an obscene, lascivious, and filthy letter, contrary to Criminal Code, § 211 (Comp. St. § 10381), and he brings error. Reversed and remanded for new trial.

W. B. Dickinson, of Buffalo, N. Y., for plaintiff in error.

Sam O. Hargus, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. The plaintiff in error was convicted of mailing an "obscene, lascivious, and filthy" letter, contrary to section 211 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [Comp. St. § 10381]), and brings the case here for review.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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The letter need not be set forth. The trial court charged the jury that "it is not contended that the letter contains in itself filthy or indecent terms or expressions"; that they need not be confused if, upon examining it in the jury room, they would say, "I don't see anything dirty or filthy about that"; also that the question was of its general intendment and purpose. But in discussing "purpose" and "motive" the court did not confine the jury to the letter, but expressed itself so broadly that it left them at liberty to convict for an undisclosed, unexpressed intent in the mind of the accused, and we think it not unlikely that the verdict came the latter way. The door was open for the jury to draw an inference that there was an ulterior purpose in the mind of the accused, which brought him within the law, regardless of the language of the letter.

It is not enough that a letter or publication be offensive to the feelings or the pride of those into whose hands it may come. Considerations of caste or social position do not enter into the law. The evil character of the letter or publication declared nonmailable by the clause of the statute under consideration must be reasonably apparent or discernible on its face. It need not be in particular words, but may appear in the structure of the sentences, and either directly or indirectly by innuendo or suggestion, or in the thought conveyed. Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799, involved newspaper publications of the latter character. Instances of suggestive letters held to offend the statute may be found in Parish v. United States, 159 C. C. A. 258, 247 Fed. 40, and United States v. Moore (D. C.) 129 Fed. 159. We approve of those decisions. But we know of no case under this clause of the statute in which it has been held that, if the letter or publication in itself is not objectionable, an undisclosed motive or intent of the writer may be found to convict him. In Knowles v. United States, 95 C. C. A. 579, 170 Fed. 409, we held that a good motive was no defense to an evil publication. The converse is measurably true. If an undisclosed evil motive or intent can bring within the statute a letter or publication that is innocent and mailable upon its face, convictions could be sustained in cases of simple newspaper "want ads," upon proof of an evil "ultimate purpose, motive, or intent" in the mind of an advertiser or publisher who employed the mails. Doubtless that would be a proper field for legislation, but we do not think the statute before us goes so far.

Cases like Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, and De Gignac v. United States, 52 C. C. A. 71, 113 Fed. 197, are not in point. They arose under the clause of the statute making nonmailable any written or printed card, letter, circular, etc., giving information directly or indirectly where, how, or from whom certain articles might be obtained. There a letter may have a perfectly clean face, and yet its mailing be a violation of the law.

The sentence is reversed, and the cause remanded for a new trial.

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(258 Fed. 229)

In re MOTRIDGE.

SIMPSON v. LAFFOON.

(Circuit Court of Appeals, Ninth Circuit. May 29, 1919.)

No. 3232.

BANKRUPTCY ⟸223—REFEREE'S COMMISSIONS—STATUTE AND GENERAL ORDERS.

Under Bankruptcy Act, §§ 40, 48, as amended by Act Feb. 5, 1903 (Comp. St. §§ 9624, 9632), and General Order No. 35, § 2, the District Court improperly allowed the referee in bankruptcy commissions of 1 per cent. of the total amount of the bankrupt's estate, amounting to $6,582.08, of which $1,085.60 was paid out for expenses of administration, leaving in excess of $5,000 from which to pay referee's commissions and for distribution among creditors.

Petition for Revision and Stipulation as to Facts from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

In the matter of E. Motridge, bankrupt, wherein R. D. Simpson was appointed trustee, and petitions against R. F. Laffoon, referee in bankruptcy, to revise, in matter of law, a certain order of the District Court. Order reversed, and case remanded for further proceedings in accordance with the opinion.

Robert C. Saunders, U. S. Atty., of Seattle, Wash., and Frederick R. Conway, Asst. U. S. Atty., of Aberdeen, Wash., for petitioner.

R. D. Simpson and R. F. Laffoon, both of Tacoma, Wash., for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The amount involved in this case is trifling; the question important. There were no secured claims against the bankrupt, but claims of general creditors were approved against his estate, exceeding in the aggregate $10,000, exclusive of such as were exempt. The property of the bankrupt, when converted into money, amounted to $6,582.08, of which amount $1,085.60 was paid out for expenses incurred in the course of administration of the estate, leaving $5,496.48 out of which to pay the commissions of the referee, and for distribution among the creditors. In his final report and statement the referee claimed as commission 1 per cent. of the total amount of the estate, which commission the court below allowed, and to which ruling the trustee excepted, and by the present petition seeks a review of the ruling.

We are of the opinion that the court below was in error. Section 40 of the original act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 556) provided as compensation to referees "from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions," and section 48 of that act provided that trustees should receive "from estates which have been

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administered such commissions on all moneys disbursed by them as may be allowed by the courts" (Comp. St. § 9632).

Both of those sections were amended February 5, 1903, the former being made to read as follows:

"Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition." Comp. St. § 9624.

We agree with the Court of Appeals of the Fourth Circuit in the case of Bray, Trustee, etc., v. Johnson, Referee, et al., 166 Fed. 57, 91 C. C. A. 643, that there is no mistaking that language. By it Congress not only specifically declared what referees should receive, namely, 1 per centum on all moneys disbursed to creditors by the trustee, but by section 72 of the same act of February 5, 1903, further expressly provided:

"That neither the referee * * * nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." Comp. St. § 9656.

Moreover, by section 2 of the General Order No. 35, prescribed by the Supreme Court for the enforcement of the Bankruptcy Law, it is also declared that:

"The compensation of referees prescribed by this act shall be in full compensation for services performed by them under the Act or under these General Orders."

See, also, Matter of Lacey & Co., 35 Am. Bankr Rep. 231, and Matter of C. J. McCubbin Co., 33 Am. Bankr. Rep. 277.

The order is reversed, and the case remanded for further proceedings in accordance with the views above expressed.

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(258 Fed. 599)

RADER v. STAR MILL & ELEVATOR CO. et al.

PATTON v. SAME.

In re GAGE ROLLER MILLS.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1919.)

Nos. 5286, 5291.

1. JUDGMENT ⟸678(1)—CONCLUSIVENESS—DECREE ESTABLISHING LIEN—EFFECT AS TO TRUSTEE IN BANKRUPTCY—ESTOPPEL.
A decree against a corporation, which was subsequently adjudicated a bankrupt, establishing and foreclosing a vendor's lien on real estate, estops the bankrupt, its trustee, and general creditors from asserting or maintaining, not only every matter offered, but also every admissible matter that might have been offered, in the foreclosure suit to defeat the plaintiff's claim.

2. BANKRUPTCY ⟸198—LIENS—LIENS DISSOLVED BY BANKRUPTCY.
A vendor's lien on property of a bankrupt, although established by a decree rendered within four months prior to the bankruptcy, is not one obtained through legal proceedings, and is not defeated by Bankruptcy Act 1898, § 67 (Comp. St. § 9651).

3. ESTOPPEL ⟸98(1)—ACTS OF CORPORATION—ESTOPPEL OF STOCKHOLDERS.
A stockholder of a corporation, who held a valid vendor's lien on its real estate, *held* not estopped by the fact that he was a stockholder from asserting such lien as against a void mortgage, which the corporation attempted to make without his knowledge.

4. MORTGAGES ⟸151(6)—VENDOR'S LIEN—RIGHTS AS AGAINST THIRD PARTIES.
Under Rev. Laws Okl. 1910, § 3847, giving a vendor's lien for unpaid purchase money subject to the rights of purchasers and incumbrancers in good faith, the lien of a vendor to a corporation *held* not displaced by an agreement by the corporation, made before it obtained the deed and without the vendor's knowledge, to give a mortgage to another, who did not know nor inquire as to the condition of the title.

5. LIENS ⟸22—ABANDONMENT OF LIEN—EVIDENCE TO ESTABLISH.
The legal presumption is that one who has a legal and equitable lien on property intends to maintain and enforce it, and his abandonment thereof may not be adjudged without clear and convincing evidence of his intention to abandon.

6. ESTOPPEL ⟸52—EQUITABLE ESTOPPEL—ESSENTIAL ELEMENTS.
Two of the indispensable elements of an estoppel in pais are that (1) the party claiming estoppel relied upon the action of the party estopped, and was thereby induced to change his position or course, and that (2) he has been or will be injured on account of that change, if the party estopped is permitted to pursue the course or have the relief he seeks.

7. BANKRUPTCY ⟸184(1)—LIEN—LACHES.
A creditor of a bankrupt, holding a void mortgage on property, but which during more than a year, and while debts to other creditors were accruing, took no steps to reform its mortgage or assert a lien, *held* not entitled to a lien as against general creditors.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

In the matter of the Gage Roller Mills, bankrupt; H. W. Patton, trustee. From an order denying a lien, G. M. Rader appeals; and from an order establishing a lien in favor of the Star Mill & Elevator Company, the trustee appeals. Reversed on both appeals.

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Frank B. Burford, of Oklahoma City, Okl. (Burford, Robertson, Hoffman & Burford, of Oklahoma City, Okl., and H. L. Adkins, of Higgins, Tex., on the brief), for appellant Rader.

E. L. Foulke, of Wichita, Kan. (J. D. Wall, of Wichita, Kan., on the brief), for appellant Patton.

C. B. Leedy, of Arnett, Okl., for Star Mill & Elevator Co.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

SANBORN, Circuit Judge. The Gage Roller Mills, a corporation, was adjudged a bankrupt on June 15, 1915, upon an involuntary petition against it filed on May 15, 1915. On May 15, 1915, it owned real estate upon the undivided three-fourths of which G. M. Rader claimed a vendor's lien for unpaid purchase money, which he insisted attached to it on August 4, 1913. On December 19, 1914, he had brought a suit against the Roller Mills for a foreclosure of this lien and a sale of the real estate to pay it in the district court of Ellis county, Okl., and on March 6, 1915, that court had rendered a decree in that suit, of the subject-matter of and the parties to which it had jurisdiction, to the effect that the Roller Mills was indebted to him and that he should recover from it $6,273.35, that this was the unpaid balance of the purchase money due him for this land, which the Roller Mills had bought of him and Elden Carper, that he had a vendor's lien for this purchase money from August 4, 1913, upon the undivided three-fourths of this land, which he owned and sold to the Roller Mills on August 4, 1913, that this lien be foreclosed, and that this undivided three-fourths of this land be sold and its proceeds applied to the payment of this lien.

Between October and December 1, 1913, the Star Mill & Elevator Company, a corporation, loaned to the Roller Mills $10,000, and on November 3, 1913, R. T. Harvey, the president of the Roller Mills, made, signed, and acknowledged, as president thereof, a mortgage upon this real estate in the name of that corporation as mortgagor to the Star Company to secure the payment of this loan, and this mortgage was recorded in the office of the register of deeds on December 11, 1913. This mortgage was not attested by the signature of the secretary of the corporation, or by its seal, as required by section 1187 of the Revised Laws of Oklahoma, and was void.

Mr. Rader presented to the bankruptcy court his claim for the allowance and enforcement of his vendor's lien upon the undivided three-fourths of the land for the amount of his decree of foreclosure. Mr. H. W. Patton, the trustee in bankruptcy of the estate of the Roller Mills, filed objections to any such relief. The Star Company presented to and filed with the bankruptcy court a claim and application for the allowance to it of a secured claim and first lien upon the land of the Roller Mills Company for the sum of $6,264.35 and interest, based on its loan and mortgage. To this claim the trustee filed objections. Pursuant to stipulations of the parties this real estate was sold by order of the bankruptcy court for $5,000, and the respective

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liens and claims of the parties were transferred from the real estate to the proceeds thereof.

The respective claims of the parties were tried out before the referee and he decided: (1) That Rader had a prior and superior vendor's lien for $6,385.35 on three-fourths of the $5,000 proceeds of the sale of the lands; and (2) that the Star Company had no lien upon any of the proceeds of the land, but was entitled to the allowance of a general unsecured claim. Upon a review of these conclusions the court below adjudged that the Star Company held the superior lien upon the $5,000, and that G. M. Rader held a second and inferior lien thereon. Rader and the trustee appealed from this decree.

[1] Counsel for the trustee presented many objections to the allowance against him and the unsecured creditors he represents of the vendor's lien of Rader. But an examination of them discloses the fact that they rest upon acts or omissions prior to March 6, 1915, when the final decree of the state court, in the suit of Rader against the Roller Mills, that the lien Rader claimed was valid, that it attached on August 4, 1913, that it be foreclosed, and that three-fourths of the land be sold to pay it, was rendered. If any of these objections ever were tenable, they are not available to the trustee now, because they arose before that decree, and might have been pleaded and tried in that suit, and, as against Rader, that decree estops the Roller Mills, the trustee, and the general creditors he represents, who stand in the shoes of the Roller Mills, from asserting or maintaining, not only every matter offered, but also every admissible matter that might have been offered, in the foreclosure suit to sustain or defeat Rader's claim. Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Board of Commissioners v. Platt, 79 Fed. 567, 571, 572, 25 C. C. A. 87.

[2] The trustee took his interest in the property subject to the final decree against the Roller Mills, and he has no rights or equities against Rader superior to those which the bankrupt had when the petition in bankruptcy was filed, about two months after the final decree of foreclosure. Rader's lien was not obtained through legal proceedings, and consequently was not defeated by section 67 of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. § 9651]), although the final decree was rendered within four months preceding the filing of the petition in bankruptcy. Farrell et al. v. Wysong et al., 246 Fed. 281, 282, 283, 159 C. C. A. 11; Hurley v. Atchison, Topeka & Santa Fé Ry., 213 U. S. 126, 132, 133, 29 Sup. Ct. 466, 53 L. Ed. 729. The trustee and the unsecured creditors he represents are therefore entitled to no relief against the decree of the court below sustaining the vendor's lien of Rader against them.

[3] But the Star Mill & Elevator Company, which was not estopped by the foreclosure decree, made the claim, which the referee denied, and the court below allowed, that it had a subsequent lien by virtue of its loan of $10,000 to the Roller Mills in October and November, 1913, which was superior in equity to Rader's vendor's lien. That court based its decision upon two propositions: First, that although the mortgage to the Star Company was void, and created no lien upon the property, by reason of the failure of the mortgagor

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corporation to attest it by the signature of its secretary and its corporate seal (1 Revised Laws of Oklahoma, § 1187), and the decisions of the Supreme Court of Oklahoma (Craggs v. Earls, 8 Okl. 462, 465, 58 Pac. 637; Randall v. Glendenning, 19 Okl. 480, 481, 92 Pac. 158), which upon this question of the construction and effect of that state's statutes are controlling in the federal courts, and although the proved fact was that Rader had no notice of the loan by the Star Company, or of the attempt to make the mortgage or give the equitable lien to the Star Company which it claims, until after that company had paid out the entire $10,000, yet merely because Rader was a stockholder in the Roller Mills for something less than $4,000, and the president of that corporation signed its name to and acknowledged the execution of the void mortgage, and the corporation received the $10,000, and Rader presumptively shared in the benefits of it, though without the knowledge of it, he was estopped from maintaining that his vendor's lien was superior in equity to the alleged equitable lien of the Star Company; and second, that, conceding the invalidity of the mortgage, there was at least an agreement between the manager of the Roller Mills and its board of directors, on the one hand, and the Star Company, on the other, that the former should make a mortgage on the real estate to secure the loan of the $10,000, and equity will treat that as done which should have been done, and will enforce the lien of the mortgage it thus treats as made against all but innocent parties, and that therefore it will enforce it against Rader.

To the first proposition no authority has been cited or discovered, no persuasive reason has been given and none has been found for the position that one who has, as Rader had, an established equitable and legal lien upon the real estate of a corporation in which he is a stockholder, is, by the mere fact that he is such stockholder, deprived of that lien, and estopped from enforcing it by the subsequent attempt to make or the subsequent making by the corporation, without his knowledge, of either a legal or equitable lien upon that property. The general rule is that an officer of a corporation, though he be a stockholder, does not, by waiver, estoppel, or otherwise, deprive himself of or injuriously affect his individual claims against it or his individual liens upon its property by his acts on behalf of the corporation as its officer. "An act done in a representative capacity will not estop one in his individual capacity." 16 Cyc. 780. Much less will the illegal or ineffective acts of such officer on behalf of a corporation estop a mere stockholder thereof, who has no notice of them until after third parties have acted upon them, from enforcing against the latter his just, equitable, and legal claims, or deprive him of the benefits thereof.

Again, the estoppel of a mere stockholder by the acts of his corporation may not extend beyond the estoppel of the corporation, and if the Roller Mills was not, by the agreement to make the mortgage and the abortive attempt to do so, estopped from performing its duty to pay its prior debt to Rader, and to respect and abide by Rader's equitable lien until it paid that debt, then Rader is not estopped from enforcing that debt and lien.

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[4] As to the second proposition of the court below, conceding that the board of directors of the Roller Mills orally agreed that that corporation should make a mortgage to the Star Company to secure the $10,000, and that equity will treat that as done which ought to have been done, does it follow that, in view of the principles and rules of equity jurisprudence, a mortgage or equitable lien ought to have been imposed upon this real estate for $10,000, subsequent in time, but superior in equity, to the prior lien of Rader, without notice to him, and without opportunity to enforce his lien?

Rader owned an undivided three-fourths of this property. He sold his interest in it to the Roller Mills for a purchase price of about $10,000, of which a balance amounting, with interest, to more than $6,000 has always remained unpaid. He delivered possession about August 4, 1913, and executed a deed of his interest, which he did not deliver until about January 15, 1914. The Star Company knew in August, 1913, that the Roller Mills purchased this property of Rader and Carper, and that the Roller Mills owed more than this $10,000. The Star Company made an oral agreement with the manager of the Roller Mills to advance to it $10,000 to purchase wheat on drafts upon it, secured by accompanying invoices of the wheat bought, that this wheat should be stored by the Roller Mills, that the two corporations should share in the profits of the transaction, and that the Roller Mills should give a real estate mortgage to secure the advances. But these advances or this loan of the $10,000 was induced by and made in reliance, not upon the expected real estate mortgage, but upon the wheat and the invoices thereof. Mr. Hyberger, the secretary and treasurer of the Star Company, after describing the agreement to advance on the drafts and invoices, testified that that was the way the Star Company had transacted Mr. Rader's and Mr. Carper's business for years before, that he was dealing with the same Carper, that that arrangement was satisfactory. Asked, "Now since that arrangement was satisfactorily explained, why did you require a mortgage on this property?" he answered, "Because he offered it together with a mortgage on the three plants they owned, Higgins, Shattuck, and La Verne." Asked, "Not knowing Mr. Tillotson, do you think you would have advanced this money without the mortgage?" he answered, "Yes, sir; on a storage proposition, particularly when the invoices were sent." Asked, "It does not make any difference to you, so long as you got the invoices, whether you had the real estate mortgage or not?" he answered, "No, sir."

All the Star Company's advances were made before December 1, 1913. The void mortgage was made November 3, 1913. The Star Company did not inquire whether or not the Roller Mills had any title to the real estate described in the mortgage, or any deed to it, and it had no notice or knowledge of Rader's lien until after it had advanced its money, except such notice as the law charges it with on account of the facts heretofore stated. Rader had no notice or knowledge of the negotiations or agreements about the $10,000 loan or the void mortgage until after the Star Company had advanced the $10,000. Section 3847, 1 Revised Laws of Oklahoma 1910, provides that:

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"One who sells real property has a special or vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured, otherwise than by the personal obligation of the buyer, subject to the rights of purchasers and incumbrancers in good faith, without notice."

The Star Company was not a purchaser, and because its alleged mortgage was void it was not an incumbrancer. If this statute had not been enacted, Rader would nevertheless have had an equitable lien for the unpaid purchase price of this real estate, and by virtue of this statute he had a legal lien thereon from August 4, 1913. It is true that in furtherance of justice equity sometimes treats that as done which should have been done; but it is difficult to perceive why the void mortgage of the Star Company ought to be transformed into a valid one, or why its lack of lien ought to be changed into a lien superior to the prior equitable and legal lien of Rader, to the destruction thereof, or how a more just or equitable result would be secured in that way.

In the absence of the affirmative action of a court of equity, Rader's vendor's lien is prior and superior, both at law and in equity, to the claim of the Star Company. In truth, the Star Company is here appealing to this court of equity to strike down this equitable and legal lien of Rader and to supersede it with its own claim. If the equities of these parties were equal, Rader's legal lien would prevail, for where equities are equal the law prevails. But they are not equal. Rader had not delivered his deed, and he neither knew of the negotiations for the purchase of the wheat or the contemplated making of the mortgage, nor had he notice of any facts calling upon him for any inquiry upon that subject, until after the Star Company had advanced all its money and the legal and equitable rights of the parties had become fixed. He was secure in his lien until he delivered his deed without the statute, and the statute secured his lien to him notwithstanding his delivery of the possession. When the Star Company had paid over all its money, he had done nothing and omitted nothing in violation of his duty to it, and "a court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction." Boone v. Chiles, 10 Pet. 177, 209, 210, 9 L. Ed. 388; Steinbeck v. Bon Homme Mining Co., 152 Fed. 333, 339, 81 C. C. A. 441.

On the other hand, while the Star Company did not know that Rader had his vendor's lien on this real estate until after it had advanced its $10,000, yet knowledge of facts and circumstances which would put a person of ordinary prudence and intelligence on inquiry is, in the eyes of the law equivalent to a knowledge of all the facts which a reasonably diligent inquiry would disclose.

"Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient knowledge to lead him to a fact, he shall be deemed conversant with it." Kennedy v. Green, 3 Mylne & Keen, 266; Wood v. Carpenter, 101 U. S. 135, 141, 25 L. Ed. 807; Swift v. Smith, 79 Fed. 709, 713, 25 C. C. A. 154.

In August, 1913, the Star Company was about to loan to the Roller Mills $10,000, and to take a mortgage on this real estate to secure

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it, and it paid over the money on this loan before December 1, 1913. In August, 1913, it knew that the Roller Mills had recently bought this real estate of Rader and Carper, and that it was indebted to one or more parties to the amount of more than $10,000. The statutes of Oklahoma, of which it must take notice, informed it that, if any part of the purchase money of that property was unpaid, Rader and Carper had vendors' liens thereon therefor, and that a mortgage of a corporation, which was not attested by the signature of its secretary and its corporate seal, was void. It is incredible that these facts and circumstances would not have put a person of ordinary prudence and diligence, in the Star Company's situation, upon inquiry as to the payment of the purchase money of this property to Rader and Carper, as to the delivery of the deed from Rader to the Roller Mills, and as to the attestation of the mortgage, and such an inquiry would inevitably have disclosed to the Star Company, before it made its advances, the vendor's lien of Rader, the fact that his deed had never been delivered, the absence of title to the property in the Roller Mills, and the invalidity of the mortgage tendered to the Star Company, and would have resulted in the proper execution of another mortgage, or an immediate suit in equity to reform the void mortgage, or to establish and enforce an equitable lien. The Star Company was not induced to make its advances by, nor did it rely upon, this mortgage, but it relied, as security for its loan, upon the wheat bought, so it made no inquiry about the vendor's lien or the title to the property until after it invested its money. In December, 1914, Rader brought his suit to foreclose his vendor's lien, and the Star Company then knew he claimed it. That suit went to decree of foreclosure in March, 1915. But, while the Star Company asked for a foreclosure of its void mortgage, never at any time before the title to this real estate passed to the trustee in bankruptcy did it bring any suit or pray any court either to reform that mortgage, to enforce its claimed agreement for a mortgage, to treat its agreement for a mortgage as performed, or to enforce any other lien than what it claimed to be the legal lien of the void mortgage.

Nothing but conscience, good faith, and reasonable diligence will move a court of chancery to effective action, and because the alleged equity of the Star Company and its diligence, or rather its lack of diligence, appeal to the conscience less strongly than the equity and diligence of Rader, which are buttressed by his statutory lien and his prompt decree of foreclosure, the priority in time and the superiority in equity of that lien over the claimed lien and equity of the Star Company ought not to be avoided, but should be and must be sustained.

[5] Before reaching this conclusion the claims and arguments of counsel for the Star Company that Rader abandoned, waived, and is estopped from maintaining his lien against that company (a) because he, as a stockholder of the Roller Mills, must have received a share of the benefits to that corporation of the $10,000 loan; (b) because he delivered his deed to the Roller Mills in January, 1914, without giving any notice to the Star Company of his vendor's lien; (c) because he became in January, 1914, the manager of the Roller

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Mills, and continued so to be until July, 1914; and (d) because on September 9, 1914, he, as a stockholder of the Roller Mills, voted to authorize its officers to sell its property to pay its debts, have been considered. But the legal presumption is that one who has a legal and equitable lien on property intends to maintain and enforce it, and his abandonment thereof may not be adjudged without clear and convincing evidence of his intention to abandon, and there is no evidence in this case of any such intention by Rader. Waiver is but another name for estoppel, and where there is no estoppel there is no waiver.

[6] Two of the indispensable elements of an estoppel en pais, and there was no other estoppel here, are that (1) the party claiming the estoppel relied upon the action of the party estopped and was thereby induced to change his position or course; and that (2) he has been or will be injured on account of that change, if the party estopped is permitted to pursue the course or have the relief he seeks. Neither of these elements exists in the case at bar, and Rader never waived his lien, nor is he estopped from enforcing it. He is entitled to a decree that he has the first lien—a lien superior to that of the Star Mill & Elevator Company, the trustee, and the unsecured creditors—on the undivided three-fourths of the proceeds of the sale of the real estate in question.

[7] A single question remains. Is the Star Company entitled to the allowance and enforcement of a preferred claim on the proceeds of the sale of the real estate subject to the superior lien of Rader as against the trustee and the unsecured creditors he represents? Because the void mortgage to the Star Company created no such lien, and its record gave no notice of such a lien to the creditors before the bankruptcy, and while the debts to them were accruing; because, before the bankruptcy, the Star Company brought no suit and asked no decree for the reformation of its void mortgage, or for the enforcement of an equitable lien or claim upon any of the property of the bankrupt, on the ground that the Roller Mills had made an agreement to give it a mortgage, and it had advanced the consideration—this question must be answered in the negative. Foerster v. Citizens' Savings & Trust Co., 186 Fed. 1, 3, 4, 5, 108 C. C. A. 267; Davis v. Harlow, 130 Md. 165, 100 Atl. 102, 104; Potter Mfg. Co. v. Arthur, 220 Fed. 843, 844, 136 C. C. A. 589, Ann. Cas. 1916A, 1268.

The decree of the court below must therefore be reversed, with costs against the Star Mill & Elevator Company, and the trustee. This case must be remanded to the court below, with directions to enter a decree allowing G. M. Rader the first lien on three-fourths of the proceeds of the real estate, less the necessary costs of administration chargeable to it, and allowing the claim of the Star Mill & Elevator Company as an unsecured claim, but disallowing its claim for any lien upon any of the proceeds of the real estate or for any preferential payment therefrom.

It is so ordered.

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(258 Fed. 829)

UNITED MINE WORKERS OF AMERICA et al. v. CORONADO COAL CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. April 28, 1919.)

No. 5154.

1. APPEAL AND ERROR ⟸1097(1)—REVIEW—SUBSEQUENT APPEALS—FORMER DECISION AS LAW OF CASE.
A question of law decided by an appellate court becomes the law of the case, and will not be reconsidered on a subsequent review.

2. COURTS ⟸343—JOINDER OF CAUSES OF ACTION—CONFORMITY STATUTE.
Where a state statute, as construed by its highest court, permits the joinder of plaintiffs or causes of action in an action at law, in the absence of federal legislation, such joinder may be made in a federal court in the state, under Conformity Act (Rev. St. § 914 [Comp. St. § 1537]).

3. ACTION ⟸50(3)—JOINDER OF CAUSES OF ACTION—ARKANSAS STATUTE.
Under the Arkansas Code of Practice, as construed by its Supreme Court, causes of action of different plaintiffs, arising out of the same torts, committed by the same persons, at the same time, and in pursuance of the same alleged conspiracy, may be joined in a single action.

4. APPEAL AND ERROR ⟸177—ESTOPPEL TO ALLEGE ERROR—FAILURE TO CLAIM RIGHTS AT TRIAL.
Where a number of causes of action against the same defendants are joined in an action, if defendants are thereby given additional rights, as a greater number of challenges to jurors, such a right must be claimed at the trial, to entitle them to insist upon it in the appellate court.

5. EVIDENCE ⟸368(1)—DOCUMENTARY EVIDENCE—COMPELLING PRODUCTION BY ADVERSE PARTY.
District Court has authority to require parties who are officers of an organization, as such officers, to produce books and records of the organization.

6. EVIDENCE ⟸373(2)—DOCUMENTARY EVIDENCE—AUTHENTICATION OF DOCUMENTS.
Records of a labor organization, containing printed reports of conferences between representatives of the organization and of employers, stenographically taken, and the correctness of which was testified to by officers of the organization and conferees, *held* sufficiently authenticated to be admissible in evidence.

7. CONSPIRACY ⟸19—ACTION FOR CONSPIRACY—EVIDENCE.
In an action by receivers of coal-mining companies against a miners' organization, its subsidiaries, and members to recover damages for destruction of property, alleged to have been pursuant to a conspiracy, records of the organization, containing reports of conferences with operators employing only union miners, in which the organization pledged itself to do all in its power to protect such operators from competition by non-union mines, *held* relevant.

8. CONSPIRACY ⟸19—ACTION FOR CONSPIRACY—EVIDENCE.
In an action for conspiracy, the law permits great latitude in the introduction of evidence tending to establish the conspiracy, and connecting those advising, encouraging, aiding, abetting, and ratifying the overt acts committed for the purpose of carrying into effect the objects of the conspiracy.

9. ASSOCIATIONS ⟸19—CORPORATIONS ⟸423—TORTS BY MEMBERS—LIABILITY—ENCOURAGEMENT OR RATIFICATION.
Corporations or associations are liable for the torts of their members or employés, if encouraged in the commission of them, or if ratified thereafter.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied November 15, 1919.

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10. CONSPIRACY ⟸19—ACTION FOR CONSPIRACY—EVIDENCE.
In a civil action for conspiracy to destroy property, indictments of some of defendants for destruction of the property and pleas of guilty are admissible against them as admissions, and against their codefendants shown to have approved and ratified their unlawful acts.

11. CONSPIRACY ⟸13—CIVIL LIABILITY—PERSONS LIABLE.
If unlawful acts were in pursuance of a conspiracy, and were committed before the conspiracy had been abandoned, or its object accomplished, all persons who were members of the conspiracy, or made themselves parties thereto at any time before it had been abandoned, or its object completed, are responsible.

12. CONSPIRACY ⟸19—ACTION FOR CONSPIRACY—EVIDENCE.
Correspondence between an arms company and officers of a labor organization, showing a purchase by the latter of arms and ammunition and their shipment to local unions, by whose striking members they were used in a battle resulting in the destruction of plaintiff's mines, was admissible against the organization, in an action against it and its members for conspiracy.

13. CONSPIRACY ⟸19—ACTION FOR CONSPIRACY—DAMAGES.
In an action for conspiracy to destroy plaintiff's mines, as a result of which and the unlawful acts of defendants pursuant thereto their leases were forfeited, evidence of the value of such leases was admissible on the question of damages.

14. DAMAGES ⟸20—TORTS—NATURAL AND PROXIMATE CONSEQUENCES.
All damages which are the natural and proximate results of a tort are recoverable.

15. CONSPIRACY ⟸21—ACTION FOR CONSPIRACY—SUFFICIENCY OF EVIDENCE—JURY QUESTION.
Evidence *held* sufficient to warrant submission to the jury of the question of conspiracy between the organization, United Mine Workers of America, and its subsidiary district and local unions and their members, to destroy plaintiffs' mine property, and to support a verdict finding such conspiracy, and that the destruction of the property was the result thereof.

16. APPEAL AND ERROR ⟸263(1)—REVIEW—INSTRUCTIONS.
An appellate court can review only that part of a charge to which exception was taken at the trial.

17. TRIAL ⟸193(1)—INSTRUCTIONS—OPINION OF JUDGE AS TO FACTS.
In the federal courts, the judge, in charging the jury, may, whenever he thinks it necessary to assist them in arriving at a just verdict, express his opinion upon the facts, where he also states that his opinion is not binding upon them, and that they are the exclusive judges of the facts.

18. APPEAL AND ERROR ⟸1070(1)—HARMLESS ERROR—VERDICT.
Where there were a number of plaintiffs in an action of tort, claiming damages in a gross sum, it is not prejudicial error that the jury returned a general verdict for plaintiffs, without apportioning the damages between them.

19. DAMAGES ⟸69—ACTIONS OF TORT—INTEREST.
In actions of tort the allowance of interest is discretionary with the jury, and the court may not allow interest where the jury has failed to do so.

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Arkansas; James D. Elliott, Judge.

Action by the Coronado Coal Company and others against the United Mine Workers of America and others. Judgment for plaintiffs,

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and defendants bring error. Affirmed, conditional on remittitur by plaintiffs.

See, also, 235 Fed. 1, 148 C. C. A. 495.

This was an action by two receivers of nine corporations appointed by the court below in one proceeding in equity, in which these nine corporations were defendants. The basis of the action is to recover damages for the destruction of the property of these corporations in the possession of the receivers, they being engaged in mining, selling, and shipping coal from Sebastian county, Ark., 75 per cent. of which shipments were made to customers outside of the state of Arkansas, in the course of interstate trade and commerce. The complaint charges that the destruction of the property was by some of the defendants, and was committed in pursuance of a conspiracy and combination formed by all the defendants, in restraint of trade and commerce, among the several states, in violation of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. §§ 8820–8823, 8827–8830), the Sherman Anti-Trust Act, and amendments.

Among the defendants named are the United Mine Workers of America, District Union No. 21, and 28 local unions of the district union; the other defendants being officers of the head and district unions and members of the local unions. None of the unions are incorporated, but they are all voluntary associations of mine workers throughout the United States. The headquarters of the national organization of the defendant United Mine Workers of America are located in Indianapolis, in the state of Indiana. It is charged that the members of said association are subdivided into about 30 districts, and numerous local unions in each district. Each district union has jurisdiction of the local unions within its district, and the United Mine Workers over all. Other allegations as to the unions are set out in the opinion of this court in Dowd v. United Mine Workers of America, 235 Fed. 1, 2, 148 C. C. A. 495, when this case was before this court before, and it is therefore unnecessary to restate them. The present receivers are the successors of Dowd, who was the plaintiff when this action was instituted. There were three amended complaints filed, and later amendments to certain paragraphs of the last amended complaint.

After the demurrers to the third amended complaint, motion to quash service of process, and a motion to strike parts of the third amended complaint had been overruled, defendants filed their answers. They denied that the plaintiffs were engaged in interstate trade and commerce, and in effect denied all the material allegations of the complaint. Then they alleged that the United Mine Workers of America is a labor union composed of more than 400,000 working men in the United States, Canada, and Mexico, engaged in the digging of coal, organized in an unincorporated society; that it has no legal entity apart from its membership, is not engaged in business for profit, but has for its objects shorter working hours for its members, reasonable compensation for services rendered, and the betterment of general working conditions for its members, as shown by its constitution, a copy of which was filed; that no member or members, officer or officers, is authorized to act for, or in behalf of, or to represent, it beyond the scope, provisions, and terms of such constitution, and if any members of the organization committed the torts complained of, their acts were beyond the scope, provisions, and terms of the constitution, and therefore not binding upon the union.

There was a trial to a jury, and a verdict for the plaintiffs, on which judgment was entered for treble the amount of the verdict. Four days after the rendition of the verdict by the jury plaintiffs filed a motion to amend the judgment, by adding interest from the date of the destruction of the property to the date of entering the judgment, although the verdict made no allowance of interest. This motion was, by the court, several months later, sustained, and the judgment amended by adding treble the interest at the rate of 6 per cent.

Alton B. Parker, of New York City (Covington & Grant, of Ft. Smith, Ark., and Henry Warrum, of Indianapolis, Ind., on the brief), for plaintiffs in error.

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Henry S. Drinker, Jr., of Philadelphia, Pa., and James B. McDonough, of Ft. Smith, Ark. (Roger B. Hull, of New York City, on the brief), for defendants in error.

Before SANBORN and HOOK, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). The record is very voluminous, covering over 3,400 printed pages. There are 184 assignments of error, but counsel in their briefs and oral arguments only insisted upon those hereinafter mentioned, and we will therefore confine this opinion to those assignments and in the order presented by counsel.

[1] 1. The defendants insist that it was error to hold the unions which were made defendants as entities, against which an action could be instituted, process had, and judgment recovered; they being unincorporated labor unions.

This question was determined by this court on the former hearing, sub nomine Dowd v. United Mine Workers of America, 235 Fed. 1, 148 C. C. A. 495, and it was there held that under the Sherman Anti-Trust Act these unincorporated unions may be sued by one injured in his business or property by reason of anything done which is forbidden by the Sherman Act. That decision is the law of the case, and cannot now be again reviewed. In re Sanford Fork & Tool Co., 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; National Bank of Commerce v. United States, 224 Fed. 679, 140 C. C. A. 219; Continental, etc., Bank v. North Platte Valley Irrigation District, 237 Fed. 188, 150 C. C. A. 334; Griggs v. Nadeau, 250 Fed. 781, 163 C. C. A. 113.

[2, 3] 2. It is next claimed that there was a misjoinder of plaintiffs and of their causes of action, and that the demurrer to the complaint on that ground should have been sustained.

In order to understand the issues involved in this motion, it is proper to state that the complaint alleges that the nine corporations, for which the plaintiffs as receivers sued, were under the control of the same persons, who owned all the shares of stock of all nine corporations and all were operated as one, eight of them being subsidiaries of the Bache-Denman Coal Company; that by reason of these facts, the destruction by the defendants of the property of said corporations, they sustained the losses jointly; that by reason of the unlawful acts of the defendants the plaintiffs were prevented from operating any of the mines, they being in close proximity in the Prairie Creek valley, in Sebastian county, Ark. It is further alleged that the receivers were appointed by the District Court by a single decree, in one action.

That under the Code of Practice of the state of Arkansas, in which state the wrongs were committed and this cause tried, it was proper to join all the plaintiffs' causes of action, all of them arising out of the same torts, committed by the same persons, at the same time, and in pursuance of the same alleged conspiracy, has been determined by the Supreme Court of the state ever since the enactment of Act May

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11, 1905 (Laws Ark. 1905, p. 798). St. Louis, I. M. & S. Ry. Co. v. Broomfield, 83 Ark. 288, 104 S. W. 133; Southern Anthracite Coal Co. v. Bowen, 93 Ark. 140, 124 S. W. 1048; Hargis v. Lawrence, 136 Ark. 323, 204 S. W. 755. Under the Conformity Act of Congress (section 914, Rev. Stat. [Comp. St. § 1537]) the state practice controls proceedings at law in the national courts held in the state, in the absence of an act of Congress. Glenn v. Sumner, 132 U. S. 152, 156, 10 Sup. Ct. 41, 33 L. Ed. 301; Sawin v. Kenny, 93 U. S. 289, 23 L. Ed. 926; O'Connell v. Reed, 56 Fed. 531, 536, 5 C. C. A. 586; Rush v. Newman, 58 Fed. 158, 161, 7 C. C. A. 136.

In Kansas City Southern Ry. Co. v. Leslie, 238 U. S. 599, 603, 35 Sup. Ct. 844, 59 L. Ed. 1478, an action arising under the national Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]), the plaintiff joined two distinct and separate actions caused by the same act of negligence, one to recover damages for the benefit of the estate of the deceased, and the other for the pecuniary loss of the next of kin. There was a verdict in favor of the plaintiff for a lump sum on both causes of action, without any apportionment to the different beneficiaries. This was made one of the assignments of error. Notwithstanding that in Gulf, Colorado, etc., Ry. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, it had been held that "Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return"—the judgment entered on the verdict of the jury without apportionment was upheld, the court holding:

"As the challenged verdict seems in harmony with local practice and has been approved by the court below [referring to the Supreme Court of Arkansas], the judgment thereon is not open to attack here upon the ground specified."

[4] But it is contended that there is an act of Congress regulating the consolidation of causes (section 921, Rev. Stat. [Comp. St. § 1547]), and that in Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706, this has been construed adversely to the ruling of the court below. We do not so construe the opinion of the court. What the court decided was that—

"Where the English consolidation rule has not been adopted, the American courts, state and federal, have exercised the authority of ordering several actions by one plaintiff against different defendants to be tried together, whenever the defense is the same and unnecessary delay and expense will be thereby avoided."

The court then proceeded:

"But although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remain distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defense, whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately."

In the instant case there was no consolidation of actions, but assuming, without deciding, that the same rule applies to actions orig-

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inally brought by several plaintiffs, or against several defendants, which could properly be consolidated under that section, objection can only be made if the parties are deprived of a right material to their defense, "whether by way of challenge of juror or of objection to evidence to which it would have been entitled if the causes had been tried separately." Of course, such rights can only be claimed at the trial of the cause, and not by demurrer to the complaint. There is no claim that the defendants were deprived of either of these rights at the trial. To entitle the defendants to insist in the appellate court that they were entitled to more than three peremptory challenges of jurors, that right must be claimed at the trial, and also that the parties complaining had exhausted their right of peremptory challenges. It was so held in Connecticut Mutual Life Insurance Co. v. Hillmon, 188 U. S. 208, 212, 23 Sup. Ct. 294, 47 L. Ed. 446, when the case, reported in 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706, was for the second time before the Supreme Court. The record here shows that the defendants only challenged one juror peremptorily. It fails to show that they had made any claim to more than three challenges. How, then, can it be claimed that the court erred, when it was never called on to rule on the question, when the jury was selected, and the defendants were not prejudiced by having exhausted the three challenges?

[5] 3. It is claimed that the court erred in requiring the defendants to produce certain books, writings, and documents.

If the petitions for the books and documents had failed to specify what books and documents were wanted, or did not make a sufficient showing of their materiality, so that the object was merely an attempt to obtain information, it would have been error to grant the petitions. United States v. Terminal Railway Association (C. C.) 154 Fed. 268, 272, and authorities cited. But each of the petitions set out and described the documents wanted, and the reasons for their materiality. All except the first petition were against the defendants as officers of the organization, to produce books and documents in their possession as such officials, which it was alleged were records of their organization. The first petition included them as officers and individuals, but this petition was denied. Section 262, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162), which is a re-enactment of section 716, Rev. Stat. (Comp. St. § 1239), authorizes such an order. It was so held in American Lithographic Co. v. Werckmeister, 221 U. S. 603, 609, 31 Sup. Ct. 676, 55 L. Ed. 873. As the orders to produce them were limited to the parties as officials of the United Mine Workers of America, and not as individuals, the claim that the orders were in violation of the Fourth and Fifth Amendments to the Constitution must also fail. Hale v. Henkel, 201 U. S. 43, 69, 26 Sup. Ct. 370, 50 L. Ed. 652; Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; Wheeler v. United States, 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. 309.

[6] 4. Did the court err in allowing the defendants in error to read in evidence extracts from the printed records of the joint conference proceedings, conferences between a large number of coal mine

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operators, employing only union labor, and the officials of the United Mine Workers of America?

To determine this assignment of error it is necessary to refer to the allegations of the complaint. The complaint, except for some amendments, which are not of sufficient materiality to this issue to require that they be set forth, will be found in a note to the former opinion of this court in 235 Fed. 9, 148 C. C. A. 495.

The last amendment to paragraph 21 gives the names of 231 operators, who had entered into an agreement with the United Mine Workers of America to employ only union miners and conform to the rules of the unions. These were furnished by the plaintiffs in pursuance of an order of the court, made on motion of the defendants. That motion, among other requests, asked that plaintiffs "state the names of the persons acting or assuming to act for the operators, referred to in said paragraph and amendments thereto." The main objection to the introduction in evidence of these records was "that no proper foundation for their introduction had been laid." The testimony shows that the proceedings of these conferences were taken down stenographically, copies furnished to the United Mine Workers of America, and by it caused to be printed and kept in its archives under the control of its secretary. Before they were introduced in evidence, Mr. Green, the secretary of the United Mine Workers' organization, testified that the printed reports were "verbatim reports of the arguments, discussions, and propositions of what took place at these conferences, and that the association caused them to be printed, and the printed volumes produced were the ones that came back from the printer." A number of representatives of the operators, and several high officials of the United Mine Workers of America, also testified orally to what took place at these meetings, and all agreed with Mr. Green, the secretary, that these printed records were correct transcripts of the proceedings of the conferences. As the testimony of the officials of the miners' organization, as well as of the operators, who attended these conferences, verified the correctness of the printed records introduced, how can it be claimed that there was no foundation for the admission in evidence of these records? St. Louis & San Francisco R. R. v. Duke, 192 Fed. 306, 309, 112 C. C. A. 564; Portland Gold Mining Co. v. Flaherty, 111 Fed. 312, 49 C. C. A. 361; Wilhite v. Houston, 200 Fed. 390, 393, 118 C. C. A. 542. The objection to their introduction for want of a proper foundation is without merit.

[7] 5. Were they irrelevant?

The records establish that these conferences between the United Mine Workers and coal operators, who employed only union labor, were held for the purpose of protecting these operators against competition from nonunion or independent operators, who were able to produce coal cheaper, owing to the fact that they had the 10-hour workday, while in the mines operated by union labor the 8-hour workday was in force; that the independent operators were not subject to the strict regulations prescribed by the Mine Workers' union, nor did they pay as high wages to the miners. To protect these op-

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erators, the records show, the United Mine Workers obligated themselves "to afford all possible protection to the trade and to the other parties hereto against any unfair competition, resulting from the failure to maintain scale rates." In order to accomplish this the organization pledged itself to attempt to "unionize" all coal mines, and thus, as stated by Mr. Lewis, its vice president—

"wipe out competition between us as miners—first, viewing it from our side of the question; next, for the purpose of wiping out competition as between the operators in these four states. When we have succeeded in that, and we have perfected an organization on both sides of the question, then, if I understand the real purpose of this movement, it is that we will jointly declare war on every man outside of this competitive field who will do anything in any way endangering the peace that exists between us. What is necessary to do this? Organize our forces in the competing fields, so far as the United Mine Workers are concerned. Go into these outside competing fields and tell your competitors that they have to join this movement, whether they like it or not, and give stability to the coal business of the United States."

In the 1902 joint conference, Mr. Robbins, speaking for the operators, complained of defendants, saying:

"Four years ago, in the city of Chicago, we agreed to be the advance guard on the question of an 8-hour day, with the distinct and absolute promise that unless our competitors were brought up to the same conditions that we would be put back where we were. And what is the result? None of our competitors have been brought up. In no place that we compete, that I know of, has the 8-hour day been established. We are competing constantly with operators that still have a 10-hour day. Their cost is proportionately less."

When the miners' convention met that year, the following resolution was adopted in order to carry out the pledges made to the operators:

Resolution 33: "Whereas, the miners of Virginia and Kentucky in the past have been a detriment to the organization in other states by their not being organized: therefore be it resolved, that our national organization shall use its power in all forms to bring these miners into the organization."

In the convention of the Mine Workers in 1904 the following resolution, introduced by a representative of a local union from district 21 (Arkansas, Oklahoma, and Texas) was adopted:

"Resolved, that in strict compliance with our obligations and teaching, we accord a hearty approval to our national board on its action in regard to district No. 15 strike, now on, in Colorado, and whatever action taken by the national that in their judgment is necessary to the successful ending, in the elevation of the craft in district No. 15, meets our entire approval, for which we pledge our unqualified support, as our knowledge of the field of Southern Colorado, in the event of an unsuccessful issue of the trouble now pending, would work almost unsurmountable and incalculable damage to district No. 21, as it would be an unjust competitor in the same commercial field, and could with very little effort undersell and supersede us in the Oklahoma and Southwestern Kansas markets."

Without setting out in full all the agreements between the miners and the union operators, and the resolutions of the miners at their conventions, for the purpose of carrying out these agreements, it clearly appears from these records that the United Mine Workers were pledged and determined to unionize all coal mines in the nonunion districts, for the purpose of protecting the operators in the district in which the mines had been unionized, in competitive mar-

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kets in other states, and in order to appease these operators, who complained at every joint conference that they were unable to comply with their agreements with the organization and compete with the independent operators, unless they are unionized. The objection is without merit.

[8] 6. The objection to the introduction of the United Mine Workers' Journal is equally untenable. The secretary of the organization, testified that—

"It is the official publication of the organization, published by authority and under the supervision of the International Executive Board of the United Mine Workers of America; that its editor is appointed by the president of the International Union."

Therefore the editorials, which were published in almost every issue of the Journal, must be deemed the acts of the organization. They were clearly admissible. As the action is one for conspiracy, the law permits great latitude in the introduction of evidence tending to establish the conspiracy and connecting those advising, encouraging, aiding, abetting, and ratifying the overt acts committed for the purpose of carrying into effect the objects of the conspiracy.

The main issue in this cause, so far as the national organization and its officers were concerned, was whether the torts committed by some of the defendants were in pursuance of an unlawful conspiracy to compel the plaintiffs and other coal mine operators to unionize their mines, and were authorized, encouraged, advised, and, if not authorized, ratified by the national organization and its officers, after they had been committed. The court did not err in admitting these journals in evidence. Clune v. United States, 159 U. S. 590, 593, 16 Sup. Ct. 125, 40 L. Ed. 269; Hitchman Coal Co. v. Mitchell, 245 U. S. 229, 249, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; Louie v. United States, 218 Fed. 36, 41, 134 C. C. A. A. 58.

[9] That corporations, and this association must be treated as such in this action, are liable for the torts of their members or employés, when encouraged in the commission of them, or if ratified thereafter, is well settled. Philadelphia, etc., R. R. v. Quigley, 62 U. S. (21 How.) 202, 16 L. Ed. 73; Denver, etc., Ry. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Stewart v. Wright, 147 Fed. 321, 327, 77 C. C. A. 499. Nor does the doctrine of ultra vires apply. National Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750; Chesapeake & Ohio Ry. v. Howard, 178 U. S. 153, 160, 20 Sup. Ct. 880, 44 L. Ed. 1015.

[10] 7. The admission in evidence of the indictment and pleas of guilty of some of the defendants, members of the local unions, for the destruction of this property, was clearly proper against those defendants, as admissions made by them, and if their unlawful acts were applauded and approved by their codefendants, after having encouraged them in their unlawful acts, such approval is a ratification of these unlawful acts, and makes them liable. Loewe v. Lawler, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; Allis Chalmers Co. v. Reliable Lodge (C. C.) 111 Fed. 267; Kroger Grocery & B. Co. v. Retail Clerks' I. & P. Ass'n (D. C.) 250 Fed. 890, 897; Alaska Steamship Co. v. International, etc., Association (D. C.) 236 Fed. 964.

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[11] Whether the acts of those defendants amounted to a ratification was a question to be determined by the jury from the evidence, under proper instructions. If the unlawful acts were in pursuance of a conspiracy, and were committed before the unlawful conspiracy had been abandoned, or the object of the conspiracy completed, all persons who were members of the conspiracy or made themselves parties thereto at any time before the conspiracy had been abandoned, or its object completed, are responsible. Thomas v. United States, 156 Fed. 897, 910, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; Smith v. United States, 157 Fed. 721, 728, 85 C. C. A. 353; United States v. Babcock, 3 Dill. 581, 585, Fed. Cas. No. 14487; Goldfield Consolidated Mines Co. v. Goldfield Miners Union (C. C.) 159 Fed. 524. In Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 243, 38 Sup. Ct. 65, 70 (62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461), Mr. Justice Pitney, speaking for the court in relation to the acts of the head organization, its resolutions, contributions of money to the striking union men, the encouragement and approval of the destruction of property, said:

"The plain effect of this action was to approve a policy which, as applied to the concrete case, meant that, in order to relieve the union miners of Ohio, Indiana, and Illinois from the competition of the cheaper product of the non-union mines of West Virginia, the West Virginia mines should be 'organized' by means of strikes local to West Virginia, the strike benefits to be paid by assessments upon the union miners in the other states mentioned, while they remained at work."

8. What has been said heretofore as to the admissibility of the records of the joint conferences applies also to the records of the meetings of the Executive Board of the United Mine Workers of America.

[12] 9. The correspondence between the officials of the Remington Arms Company, showing the purchase of arms and ammunition and payment therefor, by the officers of the United Mine Workers of America, their shipment to Hartford, Ark., to the officers of the district and local unions, their distribution by them to the striking members, shortly before the battle which resulted finally in the destruction of plaintiffs' mines, and their use by them, was admissible as tending to show that the organization aided and encouraged the commission of the torts. But in no event could the admission be prejudicial to the defendants, for there was ample testimony showing that those who committed these wrongs were members of the union, armed with guns and ammunition, which were freely used on the occasions alleged in the complaint.

[13, 14] 10. Evidence of the value of the leases held by plaintiffs, and which, by reason of the unlawful acts of the defendants, are shown to have been forfeited, was clearly a part of the damage sustained, and admissible for the purpose of enabling the jury to determine the losses and damages of the plaintiffs. Section 7 of the Sherman Act (Comp. St. § 8829) provides for threefold damages sustained by reasons of violations of the provisions of that act. A lease may be as valuable as any other species of property, and they are sold and transferred for valuable considerations in the same manner as any other

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species of property. It is almost an everyday occurrence that oil, coal, and other mining leases are sold for large sums of money. The court in its charge to the jury submitted that question fairly, and no exceptions were taken to that part of the charge. All damages which are the natural and proximate results of a tort are recoverable. United States v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; Howard v. Manufacturing Co., 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147; Farmers' Loan & Trust Co. v. Eaton, 114 Fed. 14, 17, 51 C. C. A. 640; City of Ironton v. Harrison Construction Co., 212 Fed. 353, 129 C. C. A. 29.

[15] 11. Did the court err in refusing to direct a verdict for the defendant, the United Mine Workers of America?

It is contended that the evidence fails to establish a conspiracy in violation of the Sherman Act, which is the gist of the action, and therefore it is claimed there can be no recovery in this action. A great deal of the testimony, relating to the organization of the Mine Workers, their acts to accomplish the object of absolute control of all coal mines, is almost identical with that set out in the opinion of the District Judge in Hitchman Coal & Coke Co. v. Mitchell, 202 Fed. 512, to which reference is made, in order to shorten this opinion.

The evidence, to our minds, as it was in the opinion of the learned trial judge and the jury, established the conspiracy practically beyond question. It is much stronger than that in the Hitchman Coal & Coke Co. Case. To review it fully, covering as it does over 3,000 pages of the printed record, would only tend to prolong this opinion, and serve no useful purpose. The law requires that, in order to entitle defendants to such a direction, the court must give the evidence the strongest probative effect, and view it in the light most favorable to the plaintiffs, and, if there is any substantial evidence to sustain the allegations in the complaint, a peremptory instruction must be refused. This is too well settled to require the citation of authorities. A careful reading of the evidence satisfies that it fully sustains the conclusions of the learned trial judge on these motions. There was substantial evidence to warrant a finding of the following facts:

That there was concerted action on the part of the union miners of district No. 21, with the union miners of the entire national organization and the heads of that organization, tending to demonstrate the idea and motive entertained by the entire organization, and all the members of it, that it was necessary, in order to protect the union workers in the fields already unionized, to unionize the nonunion fields, as well as to hold all those which were already unionized.

To attain the objects of the United Mine Workers, to control the mining of coal in the United States, it was deemed to be necessary that they may be in a position to enforce their demands absolutely, secure the unionization of all fields, prevent the production of nonunion mined coal, and destroy the competition of nonunion-mined coal in the markets of the country with union-mined coal.

That the national organization is composed of all of the individual members of the local unions, and by its constitution it is divided into branches, district and local, all subordinate to the national organiza-

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tion. The construction and enforcement of the constitution is placed in the officers of the national organization; the district and local organizations are directly subject to the direction and control of the International Executive Board.

That while the constitution gives to the district organization the power and authority to authorize strikes under certain conditions, it does not delegate exclusive authority to these district officers. They may order a local strike, but in view of other provisions in the constitution and in the light of the record of the doings of the Executive Board of the national organization, in exercising absolute control over the different districts, this provision seems to be only permissive, and was never intended to take the absolute control from the International Executive Board. The national board, after the local strike was ordered, had the right to supervise and absolutely control the same, and had the right to discipline to the extent of absolutely taking the charter away from the offending members in the event the orders of such national board were not complied with.

Article XII, section 2, of the constitution of the national organization, provides:

"Before final action is taken by the district upon questions that * * * may require a strike, * * * the president and secretary of the aggrieved district shall jointly prepare, sign, and forward to the national president a statement setting forth the grievance complained of, the action contemplated by the district, together with the reasons therefor, and await the decision of the national president and be governed thereby."

The national organization has, undoubtedly, under the constitution, supreme authority. The judgment, discretion, wisdom, and power of the entire organization are vested in the national organization; every member of a local union is a member of the national organization and a contributor to its funds.

That prior to April 6, 1914, when mob violence was first resorted to against plaintiffs' mines, communications were had, by telegrams, between officers of the district and members of the local organizations, that employés of the plaintiffs were on that day and until the final destruction of the property, beaten into insensibility, and that it was all done in the name, at least, of the United Mine Workers of America.

There was evidence that the national officers and officers of the district organization knew what was being done from April 6, 1914, to the day of the destruction of the plaintiffs' property on July 17, 1914, and that no effort was made to stop these unlawful acts of violence by the national organization.

It is established beyond question that the property of the plaintiffs was burned and their mines destroyed in the course of the strike, for the purpose of carrying out the aims, objects, and purposes of the national organization, and its objects were thereby attained to the extent of the elimination of the nonunion mines of these plaintiffs by the destruction of their property, and thereby kept nonunion coal, produced and intended to be produced from these mines, out of interstate commerce. There was not a word of criticism by the United Mine Workers of America—no suggestion of discipline; on the oth-

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er hand, strike benefits were paid, pensions allowed, court costs assumed, and every act committed by these members of the district and local organizations approved by the entire organization.

As to the motion of the other defendants for a directed verdict, there was also substantial evidence tending to establish that on Saturday, April 4th, when plaintiffs' mines were opened as "nonunion" or "open shop" mines, a number of the union miners congregated at the mines, some of them attempting to get inside the inclosure. On the next day, Sunday, some minor disturbances occurred, throwing of rocks toward the houses where the nonunion employés lived, and calling them opprobrious names. A few days before the opening of the mines, with nonunion employés, Mr. Reed, a member of the union, approached Mr. Argo, a bookkeeper of the plaintiffs', and asked him if the company was going to run an open shop. He then stated "that if they did they would not last longer than Pat stayed in the army." On that Sunday a meeting of the union miners was held at Hartford, and storekeepers there were told to close their stores the next day and go to Prairie Creek for the demonstration to be held there to prevent the opening of the mines with nonunion labor.

On Monday, April 6th, large crowds of union miners and sympathizers met in front of the union hall of the Prairie Creek local union, about a quarter of a mile from the office of the Prairie Creek mine No. 4, where speeches were made by some of the miners, and a committee appointed, which called on the mine superintendent and asked that the company abandon its attempt to run it as nonunion, one of the committee telling him, "if they didn't want a repetition of Colorado." Meanwhile the crowd, which had accompanied the committee, had broken over the ropes of the inclosure and assaulted two of the guards so seriously that they had to be taken to the hospital at Ft. Smith.

To prevent further trouble the mine was closed, and thereupon the miners hoisted an American flag, and alongside of it a banner bearing the words: "This is a union man's country." The nonunion miners were afraid to come out of the mine. Some of the union men then went in, pulled the fires, and assaulted and injured a number of the men. A physician, a sympathizer with the union miners, was with the strikers, but refused to treat the serious wounds inflicted on one of the nonunion men. On the next day the bookkeeper was visited at his home and warned that unless he and his wife left they would be killed. Two weeks later he was assaulted and beaten by the financial secretary of the local union.

A temporary injunction against the strikers was obtained, but in spite of that the employés of the plaintiffs were threatened and at various times assaulted. In May the temporary injunction was made permanent by the court. In that month the convention of district No. 21 was held at Ft. Smith, which was attended by the district officers, and also the defendant John P. White, president of the United Mine Workers of America. A few days later Dan Wilcox, president of the local union, at Adamson, Okl., told J. A. Murry that the miners of Oklahoma "were going to come down to Prairie Creek and clean those scabs out." The latter part of June the secretary-treasurer

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of district 21 purchased rifles from the Remington Arms Company, and from dealers at Hartford and Ft. Smith, 27 high-powered autoloading rifles, 28 old Springfield rifles, and several thousand cartridges for the same, which were paid for by checks of the union. These arms and ammunition were shipped to members of the local union. Some of them afterwards pleaded guilty to that charge and were sentenced to imprisonment. Two nonunion miners, Baskins and Sylsberry, were murdered, while in the custody of a constable. Mr. Stewart, president of district No. 21, told a deputy marshal, in talking about the injunction:

"Damn the injunction! The national government is against us, but the people are with us, and we are going to win."

Some of those working in the mines were told by members of the union, a few days before July 17th, that they had better stay out, as there was going to be trouble. Others of the employés were also warned to the same effect. Residents of Frogtown, about half a mile from the Prairie Creek mines, where many of the union miners lived, were warned by them to leave the village on July 17th, as there would be trouble, and a large number of them left. On that day meetings of the miners were held at Hartford and at Bolen Pond. The union miners, employed in the union mines in the vicinity, did not report for work on that day. About midnight of the night of the 16th, all the lights at the mine went out, and about 4 o'clock a. m. a number of men fired shots into the company's property. At 7 o'clock a. m. they surrounded the mining camp, took possession of No. 3 tipple, and blew it up with dynamite. There was a regular battle then fought between the company's employés and the union men. They then set fire to several houses, burned some loaded cars, and destroyed the property, as alleged in the complaint. In October another attempt was made to open the mines under the protection of the court, and they were again attacked and the workmen driven off.

The learned counsel for defendants neither in their voluminous brief (326 printed pages) nor in their oral argument questioned these statements of facts, nor did they seriously attack the sufficiency of the evidence, but they insist that they do not establish that the plaintiffs were engaged in interstate commerce, and therefore these acts were not in violation of the Sherman Act. The leading case relied on is United States v. Knight, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, but this case, if not expressly overruled, has been much weakened by the later decisions of the Supreme Court, and it was so held by this court when the case was here before. 235 Fed. 1, 8, 148 C. C. A. 495. As this court, when this case was here before, held that the alleged wrongs and torts of the defendants charged in the complaint, and which at the trial were established by substantial evidence, constituted an interference with interstate commerce, and violated the Sherman Act, that opinion is the law of the case, and cannot again be re-examined.

12. It is also contended that, while the constitution of the union authorizes strikes, it does not authorize unlawful acts, such as the destruction of property, and that strikes are not unlawful. The trial

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court did not hold that strikes were unlawful, but, on the contrary, held, "The right of the union miners to strike cannot be questioned," but added, "as long as no violence was used."

There were only two exceptions taken to the charge of the court. These were:

(1) "The defendants separately except to the instruction which submits to the jury the question that the United Mine Workers of America, in its entire membership, can be held responsible for the conduct of a local strike when violence is used without showing that the entire membership participated in the wrongful acts, and without full knowledge of the same ratified such wrongful conduct before the institution of this suit."

(2) "And the defendants severally except to that part of the court's charge which submits to the jury the question that the controversy between the miners and the plaintiffs in question was under the control of the International Association and its officers, and that they were charged with the duty of preventing violence and with the responsibility of any violence that occurred or any wrongful acts that were committed."

The first exception was not, and could not well be, insisted on. It is unnecessary that each and every member of an organization engaged in an unlawful conspiracy must participate in the wrongful acts committed by some of the conspirators. The act of one, in carrying out the objects of the conspiracy, is the act of all the conspirators.

The second exception has no basis whatever to rest on, as nothing in the charge of the court was to that effect.

13. The next contention is that the court erred in refusing to give the special requests for instructions asked in behalf of the defendants.

Counsel in their brief include under one head a number of assignments, 150 to 176, inclusive. They are instructions which requested directed verdicts in favor of each of the defendants. We have hereinbefore held that the court did not err in refusing to direct a verdict for any of the defendants. It is therefore unnecessary to repeat what has been said.

[16] 14. Assignment No. 177 relates to the court's additional charge, when the jury returned for further instructions and the charge given by the court when the jury was recalled, after having failed to agree on a verdict for two days.

As to the first additional charge, when the jury came into court for additional instructions, it is sufficient to state that no exception was taken to any part of that additional charge.

When the jury was recalled by the court on the second day, the court expressed its opinion as to the evidence, and said, in effect, that in its opinion the plaintiffs had made out a case entitling them to a verdict, but added:

"Now, that is the judgment of this court, and if it were my duty to decide it, I would decide it here. Now, you are not bound by my opinion. I have a right to give you my judgment; however, you are the sole and exclusive judges of the facts, and it is for you to determine these issues of fact independent of my judgment, and this court believes you ought to determine it, and under your oaths as jurors and agree upon a verdict."

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The only exception taken by defendants to that charge was:

"Mr. Grant: May I take an exception to that part of the charge with reference to the great conspiracy, and also that part which is to the effect that the organization put that in force?

"The Court: Yes, sir; in the opinion of the court you are entitled to your exception.

"Mr. Grant: I just desire to get an exception.

"The Court: The exception is allowed."

Counsel now, not only ask that that part of the charge which was excepted to be reviewed, but ask us to review the entire supplemental charge, because they say: First, that it amounted "to a peremptory instruction to return a verdict against the defendants," and, second, that "the opinion regarding the facts of the case, which the court formed and expressed to the jury, was an erroneous one."

As to the first contention, the Supreme Court, in Allis v. United States, 155 U. S. 117, 122, 15 Sup. Ct. 36, 38 (39 L. Ed. 91), said:

"There is no intimation in the exception that the defendant at the time thought that the court was trying to coerce the jury, or suggested that its language might have such an influence upon them. Evidently the claim of coercion is an afterthought, from subsequent study of the record. But it is settled that no such afterthought justifies a reviewing court in reversing a judgment."

This was in a criminal case, in which the defendant had been convicted of an infamous crime.

In Robinson & Co. v. Belt, 187 U. S. 41, 50, 23 Sup. Ct. 16, 19 (47 L. Ed. 65), it was held:

"While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record."

The same rule has been followed by this court in many cases. Lesser Cotton Co. v. St. L., I. M. & S. Ry., 114 Fed. 133, 52 C. C. A. 95; Beiseker v. Moore, 174 Fed. 368, 373, 98 C. C. A. 272; Maynard v. Reynolds, 251 Fed. 784, 786, 164 C. C. A. 18.

[17] But even if there had been an exception sufficient to present that issue in this court, the charge did not pass beyond the limits of the rule of the national courts relative to the statement to the jury of the court's opinion upon the deductions from the evidence relative to the facts in issue. In Vicksburg & Meridian R. R. v. Putnam, 118 U. S. 545, 553, 7 Sup. Ct. 1, 2 (30 L. Ed. 257), that rule is thus stated:

"In the courts of the United States, as in those of England, from which our practice is derived, the judge, in submitting the case to the jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, and call their attention to the parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error."

Other cases to the same effect are United States v. Reading R. R., 123 U. S. 113, 114, 8 Sup. Ct. 77, 31 L. Ed. 138; Doyle v. Union

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Pacific Ry., 147 U. S. 413, 430, 13 Sup. Ct. 333, 37 L. Ed. 223; Simmons v. United States, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968; Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873; Freese v. Kemplay, 118 Fed. 428, 430, 55 C. C. A. 258; Smith v. St. Louis, I. M. & S. R. R., 214 Fed. 737, 742, 131 C. C. A. 43; Griggs v. Nadeau, 250 Fed. 781, 163 C. C. A. 113.

The court in its general charge said:

"In trials of this character, like all civil actions, the exclusive province of the jury is to pass upon the facts, and determine the issues of fact that are presented by the pleadings."

In the supplemental charge, of which the defendants now complain, the court told the jury:

"Now, you are not bound by my opinion. I have a right to give you my judgment; however, you are the sole and exclusive judges of the facts, and it is for you to determine these issues of fact independent of my judgment."

In our opinion this charge clearly and forcibly submitted every material fact which had arisen during the trial, and neither peremptorily nor otherwise coerced or directed a verdict in favor of either party. Suslak v. United States, 213 Fed. 913, 919, 130 C. C. A. 391.

Turning to the only question covered by the exceptions, to wit, the opinion which the court expressed to the jury in the supplemental charge, with reference to the great conspiracy, and also that part which is to the effect that the organization put that in force, is also untenable. First, there was no error in the court's charge upon the subject, because he merely expressed his opinion on the evidence, the facts and the effect of the evidence, and he told the jury that his opinion was not binding upon them; so it necessarily follows that, even if it was a mistaken opinion, it was not error, under the rule of practice in the national courts, to express his opinion of the evidence. As stated hereinbefore, there is a vast volume of substantial evidence tending to sustain his views.

[18] 13. Assignments 178 and 179 are to the effect that the court erred in accepting the verdict in the form returned by the jury, to wit:

"We, the jury find the issues in favor of the plaintiffs and against the defendants, and assess plaintiffs' actual damages at $200,000.00"

—and not requiring the jury to find the separate damages sustained by the several plaintiffs. The exception taken to the verdict was:

"Mr. Grant: I would like to except to the form of the verdict, for the reason that, as we understand it, the verdict of the jury should apportion the damages."

The exception does not specify whether counsel wanted the damages apportioned among the plaintiffs or the defendants. If it was intended to have the apportionment between the defendants, it was clearly without merit. Washington Gaslight Co. v. Lansden, 172 U. S. 534, 552, 19 Sup. Ct. 296, 303 (43 L. Ed. 543), where it was held that—

"Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining

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the question of the different degrees of culpability. And if but one is sued, he is liable for all the damages inflicted by the most culpable."

If it was intended to have the apportionment of the damages awarded to the plaintiffs, the request should have been made to that effect, in order that the court may have its attention called thereto. But, assuming that the exception was intended to have the apportionment of the damages to each of the corporations represented by the receivers, without requesting it in plain language, the exception cannot be sustained. There is no complaint that the verdict is excessive; therefore, it may well be asked, how are the defendants prejudiced? As stated in Kansas City Southern Ry. v. Leslie, 112 Ark. 305, 332, 167 S. W. 83, 93 (Ann. Cas. 1915B, 834):

"Appellant, at the time the verdict was rendered, made no objection to its form. He did not ask that the jury be required to return separate amounts for pain, and suffering, and for loss of contributions. The widow and child, under the law, were entitled to the entire amount. They were the only persons having a pecuniary interest in the amount of damages recovered, and it could not prejudice appellant because these damages were returned in a lump sum. Appellant will be protected in the payment of the judgment as rendered, since all of the parties who had an interest in the same are represented in the suit."

This was approved by the Supreme Court. 238 U. S. loc. cit. 604, 35 Sup. Ct. 844, 59 L. Ed. 1478. It may be that the rule would have been different if there had been separate actions by each of the corporations, claiming different amounts, and these actions had been consolidated. But there was only one action for one gross sum.

[19] 14. Assignments 183 and 184 attack the action of the court in adding to the damages assessed by the jury interest from the date the property was destroyed to the day of judgment, and trebling that interest.

The motion of plaintiffs for interest was filed 4 days after the verdict had been returned and judgment entered thereon, and the order of the court correcting the judgment, which had been entered on the verdict of the jury, was made 11 months after the entry of the judgment. This, in our opinion, was error. The allowance of interest in actions of tort is discretionary with the jury. In Eddy v. La Fayette, 49 Fed. 807, 1 C. C. A. 441, this court held that an instruction on the measure of damages, in an action for a tort by a railway in negligently setting fire to property, to award interest, was error. The Supreme Court, in affirming the judgment (163 U. S. 456, 467, 16 Sup. Ct. 1082, 1086, 41 L. Ed. 225), said:

"Undoubtedly the rule, in cases of tort, is to leave the question of interest as damages to the discretion of the jury."

Other cases in point are Lincoln v. Claflin, 74 U. S. (7 Wall.) 132, 139, 19 L. Ed. 106; The Scotland, 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153; De La Rama v. De La Rama, 241 U. S. 154, 159, 36 Sup. Ct. 518, 60 L. Ed. 932, Ann. Cas. 1917C, 411; District of Columbia v. Robinson, 180 U. S. 92, 107, 21 Sup. Ct. 283, 45 L. Ed. 440; Arnold v. Horrigan, 238 Fed. 39, 47, 151 C. C. A. 115. And this is the settled rule established by the Supreme Court of the state of

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Arkansas, where the tort was committed and the action tried. Watkins v. Wassell, 20 Ark. 420; Crow v. State, 23 Ark. 684, 694. In no event can the court add interest to the verdict of the jury, when the jury had failed to allow interest, whether the action is ex contractu or ex delicto. Hallum v. Dickinson, 47 Ark. 120, 126, 14 S. W. 477: Ark. & La. Ry. v. Stroude, 82 Ark. 117, 127, 100 S. W. 760; McDonough v. Williams, 86 Ark. 600, 608, 112 S. W. 164; Minot v. Boston, 201 Mass. 10, 86 N. E. 783, 25 L. R. A. (N. S.) 311; Dyer v. Combs, 65 Mo. App. 148. Nor is there anything in the Sherman Act which changes this rule.

Thomsen v. Cayser, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322, relied on by defendants, is not in point. In that case the jury, by its verdict, allowed interest, but failed to compute it. The verdict of the jury was "for the plaintiff in the sum of fifty-six hundred dollars, with interest." Interest having been awarded by the jury, the computation was merely ministerial. Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402, was an action in equity, and the chancellor in his discretion allowed interest, as the jury may have done in this case, but refused to do so. None of the authorities cited by counsel sustains the contention that in an action for a tort the court may allow interest, when the jury had failed to do so. In equity and admiralty, the court, in assessing the damages, acts as a jury, and therefore such cases are not in point.

As the amount allowed for interest is fixed, this error may be corrected without remanding the case for a new trial, by permitting the defendants in error to enter a remittitur for that sum. As this is the only error in this cause, defendants in error will be permitted to file a remittitur in the court below, within 40 days from the filing of this opinion, for the interest allowed, and upon filing a certified copy of such remittitur with the clerk of this court the same will be affirmed; otherwise, it will be reversed, with instructions to grant a new trial.

HOOK, Circuit Judge (dissenting). After the jury had deliberated without result for about two days, the trial court of its own motion recalled and charged them in a way that soon produced the verdict. Parts of this charge will be presently set forth. Having in mind the constitutional relations between court and jury, and their practical relations as well, I cannot escape the conviction that the language employed by the court was so forcible that it virtually coerced the verdict. That should never occur where the state of the evidence requires its submission to a jury, however unequal in weight the court may regard it. The power of a court to comment upon the evidence and to assist a jury in performing their duties is one of the most valuable features of the practice in the courts of the United States, and its exercise almost always makes for right and justice. But, however strongly a court may feel in a case that should properly go to the jury, the power to comment and assist them is not a power to direct a verdict, and the distinction should always be observed. Words often take compelling force from the authority of him who utters them; and when he may, but should not, command, he must be most careful with advice. The Supreme Court has said:

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"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." Starr v. United States, 153 U. S. 614, 626, 14 Sup. Ct. 919, 923 (38 L. Ed. 841).

And upon the same subject this court said:

"But his comments upon the facts should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment." Rudd v. United States, 97 C. C. A. 462, 173 Fed. 912.

It should be borne in mind that the trial court did not regard the case at bar as one for a directed verdict against the defendants, nor do my Brothers hold differently in the foregoing opinion. It was a case for the jury, and if in effect the verdict was directed by the court, error was necessarily committed.

In the foregoing opinion the exceptions to the charge are held insufficient to raise this question. The exceptions might have been more specific, but I think the intention of counsel was sufficiently evident, and that the trial court understood it. But whether this is so or not is not now decisive of our duty. A recent amendment of section 269 of the Judicial Code, approved February 26, 1919 (40 Stat. 1181, c. 48), provides:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The matter under discussion was of vital importance and is well within the above provision. It was not an inadvertence or casual ruling in the progress of the trial, to which specific objection or exception was necessary to inform the court and give it opportunity for correction, but it was a deliberate action, going to the very root of the judgment now under review. In view of the above I will now set forth parts of the charge, the italics being mine:

"*I want to say to you that the court has no thought at all of discharging you. You were sworn upon your oaths to do your duty as jurors. In the opinion of the court there is no reason on earth why reasonable men,* with a due regard for right, and each having due respect and consideration for the other's opinion, *should not arrive at a conclusion in this case.* What would be a fortune to either of you, or [to me], has already been spent and *a failure to render justice in this* and other [cases] *is what brings the courts into contempt.* * * * *And you are advised that this court is of the opinion* that the facts in this case justify you in *the conclusion overwhelmingly* that it was the policy, and therefore the agreement, for years of this national organization to prevent mining of nonunion coal for the unlawful purposes named in this complaint that it might not come into competition with union-mined coal; *that there is no question in this court's mind but that* that strike was ordered down there for that purpose to prevent the mining of nonunion coal in these plaintiffs' mines; that the strike was called by those who were the instrumentality of the greater organization, the general organization, the defendants, and their act was its act, and that they put into motion the force that destroyed this property. * * * *Why, this court has not a thought that* there would ever have been any trouble there if it had not been for the prevention of the mining of nonunion coal. *Now, that is the judgment of this court,*

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and if it were my duty to decide it I would decide it here. * * * If there is any question about the law on the responsibility for this, responsibility of the greater organization, that is for the higher court to say; but you cannot reach it until you have done your duty—*you are the stumbling block in the way and this whole time is wasted.* Now, after I have said what I have, I am going to say that *I have no thought of discharging you; you must return a verdict in this case.*"

Of course, the court said it was for the jury to determine the facts, and that they were not bound by its opinion, etc.; but are not such expressions wholly futile in the compelling force of the above? There are occasions in which the statement of a principle of law is but an academic formula. Can it reasonably be said, after such a charge, that the jury felt free to exercise their own independent judgment? The question whether the well-established province of a jury is invaded is to be judged by the natural effect of the charge upon the minds of the jurors. How did they feel about it? Did they feel free to exercise their functions independently, or were they constrained by the intrusion of the personality and power of the judge, and the fear of his displeasure, ridicule, or contempt? In this case they were reminded of their oaths; they were told that they would not be discharged, but had to return a verdict; that there was no reason on earth why they should not agree; that failure to render justice would bring the court into contempt; that there was no question in the mind of the court about the evidence; that it was overwhelmingly one way, meaning against the defendants; and that they were a stumbling block in the way of the final determination of the legal responsibility for the acts charged. It is regrettable that this incident occurred, for up until that time the case was most admirably and carefully tried.

In my opinion the judgment should be reversed.

(258 Fed. 849)

CHIN FONG v. WHITE, Immigration Com'r.*

(Circuit Court of Appeals, Ninth Circuit. June 2, 1919.)

No. 3180.

ALIENS ⟸27—CHINESE—EXCLUSION—RE-ENTRY AS MERCHANTS.

A Chinese person, claiming right to re-enter the United States under Act Nov. 3, 1893, § 2 (Comp. St. § 4324), as having been a merchant in the United States for a year before his departure therefrom, may not thereunder, and under rule 15, subd. 11, of the Department of Labor, as to admission of Chinese claiming such right of re-entry, be denied admission by the Commissioner of Immigration on the ground that his original entry was unlawful; but this is a matter for determination in a deportation proceeding before a different tribunal.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus proceeding by Chin Fong against Edward White, Commissioner of Immigration at the Port of San Francisco, to se-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari granted 250 U. S. 656, 40 Sup. Ct. 14, 64 L. Ed. —.

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cure the discharge of petitioner, held by the Commission of Immigration for deportation as a Chinese person not entitled to re-enter the United States under the provisions of the Exclusion Act. From the order discharging the writ, and remanding petitioner for deportation, petitioner appeals. Reversed, with direction.

See, also, Chin Fong v. Backus, 241 U. S. 1, 36 Sup. Ct. 490, 60 L. Ed. 859; Ex parte Chin Fong, 213 Fed. 288.

George A. McGowan, of San Francisco, Cal., for appellant.

Annette Abbott Adams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The appellant, Chin Fong, is a Chinese person who arrived at the port of San Francisco on December 23, 1913, from China on the steamship Persia. He had previously departed from the port of San Francisco for China on November 12, 1912, on the steamship Nile. He claimed the right to re-enter the United States as a returning Chinese merchant. The provisions of the treaty between the United States and China, concluded November 17, 1880 (22 Stat. 826), excluded laborers, but provided that certain subjects of China, including merchants, might "go and come of their own free will and accord." Chin Fong claimed the right of re-entry under the provisions of Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 7, 8 (Comp. St. § 4324), which provides:

"Sec. 2. * * * The term 'merchant' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.

"Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

Pursuant to law the Department of Labor has prescribed certain rules governing the admission of Chinese; among others a rule of procedure for those claiming the right to re-enter the United States as merchants previously domiciled in the United States as such. Subdivision 11 of rule 15 of such rules provides as follows:

"(11) *Proof of Mercantile Status.*—Chinese applying for preinvestigation under the terms of this rule, or for admission without having taken advantage of the rule, on the ground of having been domiciled in the United States as merchants, shall be required to establish to a reasonable certainty that they are actually owners of the business claimed or members of the firm owning such business, with proofs of the amounts actually paid for their respective interests and the times at which such payments were made. In no case should the claim of mercantile status be allowed unless inspection of

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the alleged mercantile establishment shows a bona fide capital and stock, the latter commensurate with the former and with the number of partners claimed."

In the appellant's statement made to the officers of Immigration upon his arrival at the port of San Francisco in December, 1913, he claimed to be a member of the business house of Kwong Mow Lan & Co., at No. 8 Pell street, in New York City. The papers were accordingly forwarded to the Commissioner of Immigration in New York City for an investigation of that claim. Inspector Sisson, in charge of the Immigration service in the New York office, reported the appellant's status as a merchant in New York City as follows:

"Referring to your letter of the 2d instant, No. 13137½, I return herewith papers in the case of Chin Fong ex S. S. Persia, December 23, 1913, applying for admission at your port as a merchant and member of the firm of Kwong Mow Lan & Co., No. 8 Pell St., New York City:

"In connection with this case would state that our records show that this applicant filed an application for a return certificate as a merchant and member of the above firm in this office on December 9, 1911, and that the said application was given unfavorable consideration by the Commissioner of Immigration at Seattle, Washington, under date of January 18, 1912, and I have requested the Seattle office to forward to you the original record. In view of the fact, however, that while this application was denied in January, 1912, he did not depart from the United States until November 23, 1912, a further investigation has been made covering this period, and attached to the record will be found in triplicate the sworn statement of Chin Fong, the manager of the firm, together with those of the statutory witnesses, Messrs. Israel Brand and John L. Delmonte, both of whom are business men, and so far as this office knows reputable.

"From the examination of this applicant conducted at your port it is noted that he claims to have been first admitted to the United States in K. S. 32 (1906) at Niagara Falls as a section 6 Canton merchant, and further that his certificate was lost at the time the firm of Yung Wah Tong was moving in the fifth or sixth month of S. T. 1 (1909) from No. 32 Mott St. to 33 Pell St. Niagara Falls was not a port of entry for Chinese in K. S. 32 (1906) and consequently he could not have been admitted through that port. Further the firm of Quong Yuen Shing & Co. has occupied the premises at No. 32 Mott St. for many years last past, as is also the case with the firm of Chong Lung & Co. at 33 Pell St.

"By reference to the statement of this applicant made before this office on January 3, 1912, which will form a part of the record to be forwarded to you by the Seattle office, it will be noted that Chin Fong testified he was first admitted to the United States in K. S. 22, 11th month (Dec., 1896—January, 1897), at Niagara Falls, upon a merchant paper which had been forwarded to him by the firm of Young Wah Hong & Co., No. 33 Mott St., and that he continued in business with said firm for a period of about six years, which would be until 1902 or 1903, when the firm went out of existence.

"Kwong Mow Lan & Co. are engaged in manufacturing cigars at No. 8 Pell St., where they also dispose of them at retail as well as wholesale, and it is believed to be a bona fide establishment."

Upon this report, and other testimony taken by the Immigration officers in San Francisco, the Commissioner of Immigration at that port made the following finding and decree:

"*Finding and Decree.*—The applicant applied for preinvestigation of his alleged status as a merchant (form 431) in December, 1911, but his application was denied by the Seattle office, and an appeal from that decision dismissed by the Bureau for the reason that it was satisfactorily shown at that time that the applicant had fraudulently secured his original admission to the

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United States; it having been claimed by him that he entered this country at or near Niagara Falls, New York, in 1897, on 'merchant's papers' sent to him in China by the Young Wah Hong Company at New York. It was first claimed by the applicant in the present case that he was admitted at Niagara Falls in 1906, but when confronted with his previous testimony he denied the last-mentioned statement, and reiterated the year first mentioned as the date of his original entry, and stated that he was then admitted as a section 6 Canton merchant on papers secured by him in that city.

"Niagara Falls was not a port of entry for Chinese in 1906, *and the applicant has not satisfactorily accounted for the present whereabouts of the papers on which he claims to have been admitted, so that it must be concluded that his domicile in this country was unlawful;* and as the Bureau has sustained the action of the Seattle office in refusing his application for form 431, the applicant is denied admission and advised of his right of appeal."

An appeal from this decision was taken to the Secretary of Labor, who approved the decision of the Commissioner of Immigration. The finding of the Acting Secretary of Labor was as follows:

"Washington, March 6, 1914.

"In re Case of Chin Fong.

"I am satisfied that the action recommended by the Bureau is the correct one in this case. The original entry of this man was obtained by fraud. He cannot predicate any right whatever upon the basis of fraud. The fact that he has been permitted to remain in this country constitutes no waiver of the right to deport him, and the fact that the government has not heretofore affirmatively exercised the authority to deport him, while it amounts to tentative permission to remain here, does not preclude or estop the government from exercising its authority to deport or deny admission at any time. A different question would be presented were the facts such that it did not appear that the alien's original entry was fraudulent. No business he might engage in nor length of residence here can cure the fraud perpetrated by him in gaining admission in the first instance.

"This case appears to be quite fairly within the Mack Fock decision, which, in my opinion, is correct. The recommendation that admission be denied is approved.

"JBD/G. J. B. Dinsmore, Acting Secretary."

The appellant thereupon applied to the District Court for a writ of habeas corpus, which was denied. Ex parte Chin Fong, 213 Fed. 288. An appeal was then taken to the Supreme Court of the United States, upon the theory that the construction of the treaty of November 17, 1880, was involved. The appeal was dismissed, on the ground that Chin Fong was seeking to re-enter the United States under section 2 of the Act of November 3, 1893, and not under the treaty of 1880, and that—

"Where the right of a person of Chinese descent to enter this country depends, * * * upon the statutes regulating Chinese immigration, and not upon the construction of provisions of treaties relating thereto, a direct appeal would not lie to the court under section 238 of the Judicial Code [Comp. St. § 1215] from a judgment dismissing a petition for habeas corpus." Chin Fong v. Backus, 241 U. S. 1, 36 Sup. Ct. 490, 60 L. Ed. 859.

By permission of the District Court, the appellant was then permitted to again file a petition for a writ of habeas corpus, basing his claim for relief upon his alleged rights vested in him by the statute, and not upon rights previously supposed to flow from the treaty with China.

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The appellant contends that he has met every requirement of the statute providing the terms and conditions upon which he, as a Chinese merchant, as described in section 2 of the act of November 3, 1893 (28 Stat. 7), domiciled in the United States, is entitled to reenter the United States; that is to say, he has established by the testimony of two credible witnesses, other than Chinese, that he was a merchant and a member of the firm of Kwong Mow Lan & Co., No. 8 Pell street, in New York City; that such location was his fixed place of business for at least one year before his departure from the United States in November, 1912, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of said business as a merchant; that he is being excluded for reasons not mentioned in the statute, or in any rule or regulation of the Department of Labor; that such exclusion is against the law, and is therefore an abuse of discretion on the part of the Commissioner of Immigration.

The evidence in the record fully supports the appellant's claim of a mercantile status in the United States prior to his departure therefrom in 1912. The report of Inspector Sisson is that—

"Kwong Mow Lan & Co. are engaged in manufacturing cigars at No. 8 Pell street, where they also dispose of them at retail as well as wholesale, and it is believed to be a bona fide establishment."

Referring to the findings and decree of the Commissioner of Immigration at San Francisco, excluding the appellant, we find that the reason for such exclusion is, not that he was not a merchant, but that—

"The applicant has not satisfactorily accounted for the present whereabouts of the papers on which he claims to have been admitted, so that it must be concluded that his domicile in this country was unlawful."

The papers here referred to by the Commissioner are the papers upon which the applicant claims to have been admitted into the United States in 1896–1897, or 1906, and concerning which there was some mistake as to whether it was 1896–1897, or 1906. There is no finding and decree by the Commissioner as to whether the applicant was a merchant in New York City for at least one year before his departure for China in 1912, and there is no intimation or suggestion that he was not such a merchant. The Acting Secretary of Labor, in approving the decision of the Commissioner of Immigration, did so upon the ground that "the original entry of this man was obtained by fraud"; but this was not the question submitted to the Commissioner of Immigration or to the Secretary of Labor for decision. The question was not whether the applicant was legally admitted in 1896–1897, or 1906. The question was whether he had been a merchant in the United States at least one year before his departure from the United States in 1912 (Chin Fong v. Backus, 241 U. S. 1, 5, 36 Sup. Ct. 490, 60 L. Ed. 859), and upon that question the evidence was all one way, establishing beyond controversy all the facts required by the statute and the rule of the Department of Labor to the effect that he was such a merchant at No. 8 Pell street, New York; that it had been his fixed place of business for at least

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one year before his departure from the United States; that the business in which his firm was engaged was that of manufacturing cigars; that the cigars were disposed of at retail as well as wholesale, and the establishment was bona fide; and the witnesses by which these facts were proven, other than Chinese, were business men, and so far as known to the inspector were reputable men. This question so presented to the Commissioner of Immigration was not decided, either by the Commissioner or the Acting Secretary of Labor; but they undertook to decide another question, namely, that the applicant had fraudulently secured admission into the United States either in 1896–1897, or 1906, as a merchant defined in the treaty of 1880.

The Supreme Court in this case (Chin Fong v. Backus, supra), referring to the definition of a "merchant" as described in the treaty, points out that "it was the definition of the status acquired in China, not acquired in the United States, and, having been acquired in China, gave access to the United States, and after access freedom of movement as citizens of the most favored nations," and because the case as there (and here) presented did not involve the status of Chin Fong as a merchant under the treaty, but did involve his status solely under the act of November 3, 1893 (28 Stat. 7), the court held that it had no jurisdiction of the appeal.

The case of Ex parte Mack Fock, 207 Fed. 696, referred to by the Acting Secretary of Labor as an authority supporting his decision, is not in point. In that case the application was that of a Chinese person who claimed to be a returning native-born American of Chinese descent. In support of that claim he presented a paper purporting to be a certificate issued by Felix W. McGettrick, United States Commissioner at St. Albans, in the district of Vermont, on the 12th of June, 1906, certifying that it had been adjudged by him that said Mack Fock had a lawful right to be and remain in the United States by reason of his being a citizen thereof. The question submitted to the Commissioner at Seattle was whether or not Mack Fock was a native-born American. Upon examination the Commissioner found that he was not, and that he was in fact born in China. The Commissioner thereupon ordered his exclusion upon the precise issue presented by the applicant for admission. It may be contended that in the present case the Commissioner of Immigration did in effect determine the question at issue when he concluded that appellant's original entry into the United States was unlawful, and for that reason he was never lawfully domiciled in this country, and that this conclusion is sufficient to overcome the specific finding that he was a merchant domiciled in this country for at least one year prior to his departure therefrom in 1912, and under that finding entitled to return under the act of November 3, 1893. But whether Chin Fong's original entry into the United States under the treaty was or was not lawful was a different question, not presented in this case (Chin Fong v. Backus, supra), and one to be determined in a deportation proceeding before a different tribunal. See Act May 6, 1882, c. 126, § 12, 22 Stat. 58, 61, as amended by Act July 5, 1884, c. 220, 23

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Stat. 115, 117 (Comp. St. § 4299); Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 476, 479 (Comp. St. § 4313); Act March 3, 1901, c. 845, § 3, 31 Stat. 1093 (Comp. St. § 4334).

Our conclusion is that the appellant has been denied admission for a reason other than that connected with his status as a merchant under the act of November 3, 1893, and for that reason the order of exclusion is void.

The judgment of the District Court is reversed, with direction to discharge the appellant from custody.

(258 Fed. 855)

RUTHERFORD et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 239.

CRIMINAL LAW ⟸657—TRIAL.

In a prosecution against the leaders or a religious society, who it was charged had violated the Espionage Act, where the government called members of the society and they proved unwilling witnesses, *held*, that the acts of the trial court in committing such witnesses for contempt, on the theory that they were falsifying when they refused to answer questions, but stated that they did not remember, etc., was under the circumstances so prejudicial to defendants that a new trial should be granted.

Manton, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of New York.

Joseph F. Rutherford and others were convicted of violating Espionage Act June 15, 1917, tit. 1, §§ 3, 4, and they bring error. Reversed and remanded.

Sparks, Fuller & Stricker, of Brooklyn, N. Y., for plaintiffs in error.

James D. Bell, U. S. Atty., and Charles J. Buchner, Sp. Asst. U. S. Atty., both of Brooklyn, N. Y., and I. R. Oeland, Sp. Asst. Atty. Gen., of New York City.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment of conviction of the defendants, eight in number, indicted for violation of sections 3 and 4, title 1, of the Espionage Act of June 15, 1917 (40 Stat. 219, c. 30 [Comp. St. 1918, §§ 10212c, 10212d]). Seven of the defendants were sentenced to terms of 20 years and the eighth to a term of 10 years in the federal penitentiary at Atlanta, Ga. The defendants are members of religious organizations known as the International Bible Students' Association, the People's Pulpit Association, and the Watch Tower Bible & Tract Society, all representing a form of religious doctrine preached from 1870 down to the time of his death in 1916, by a person known as Pastor Russell. One of these doctrines is an absolute prohibition of the killing of human beings, and so of taking any part at all in war. The trial continued from June 5

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to June 20, 1918. We think there was sufficient evidence upon which to submit the case to the jury, and that none of the errors assigned is ground for reversal, except in respect to the matters now to be considered.

The government called three witnesses, all members of the International Bible Students' Association, Mrs. Mabel Campbell, Mrs. Agnes Hudgings, and William F. Hudgings. They were not willing witnesses, and the court properly allowed the government great latitude in examining them. Mrs. Campbell refused to swear that the carbon copy of a letter submitted to her had been written by her from the dictation of the defendant Van Amburgh. At the conclusion of the examination in chief the court said:

"The court suggests that if the defendants desire to cross-examine this witness that you recall her later. This witness is not discharged, but will remain in attendance. We will take some other witness for the present."

This was, as he subsequently said, to give her an opportunity of taking advice as to her testimony before being recalled for cross-examination. She never was so recalled.

Mrs. Hudgings was called with reference to a letter with a rubber stamp signature, J. F. Rutherford, one of the defendants:

"Q. I hand you Exhibit 11 and ask you if you identify that rubber stamp there as similar to the one that Mr. Rutherford used? A. No, I wouldn't identify that stamp.

"Q. Is there anything peculiar about that? A. I don't understand you.

"Q. Anything peculiar about that rubber stamp there? A. It is the same as all rubber stamps, as far as I know.

"Q. What did he have on the rubber stamp that you knew that he used? A. 'J. F. Rutherford.'

"Q. Was it the same as that (indicating)? A. I think so.

"Q. Looks like that? A. Some.

"Q. You have seen him use it frequently? A. Yes, sir.

"Q. How often? A. Couldn't say.

"Q. Do you see any difference between that and the one that you had seen him use? A. I have not paid such particular attention to it that I would specify.

"Q. I ask you, could you see any difference between that and the one you have seen him use? A. I couldn't answer that question.

"The Court: The court is inclined to think you can, and you must answer it. The question is if you can see any difference, and you must answer that question.

"The Witness: Your honor, I might say—

"The Court: I might say to you, Mrs. Hudgings, that we must have full, true, direct answers to all these questions that are asked you which the court decides are proper. Your answers thus far have seemed to be evasive.

"Mr. Fuller: I except to these remarks of the court on behalf of each of the defendants.

"Mr. Sparks: I ask that the witness be permitted to make the statement that was called out by the court in view of the characterization of the court's question to her. I ask that she be permitted to make her statement for the record.

"The Court: She may make any statement she desires to.

"The Witness: I was about to say that I gave an oath that I would tell the truth and the whole truth as nearly as I was able to, and that I would not identify the stamp for the reason that I could not; that I did not know the stamp plainly enough so I could identify it, and therefore do not wish to give false testimony.

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"The Court: This second witness seems to be taking an attitude that the court can't permit to continue. Now, the court has great power as to compelling a witness to answer, and answer directly, and has much power in case a witness is evasive in answering. This is rather extraordinary, and in the case of the other witness I had her withdraw, thinking that likely counsel for the defense would advise her, or some one else. Now, the question here is not for you to identify this stamp; the question was if it looked like the one you saw this person use. Ask the witness whether she was the one that used the stamp in stamping letters.

"Mr. Sparks: I take exception to the court's remarks and the general character of it as tending to make the witness say something which she has already stated she could not do. I take also exception to that part of the court's remarks in which he says that he suggested that the previous witness might be withdrawn in order that counsel for the defense or some one else might advise her, not knowing what counsel could advise her to do in view of her testimony, and in view of the position of counsel for the defendants, that the witness could not possibly answer the questions that were propounded to her by the court and counsel.

"The Court: The court is very much inclined to believe that the former witness could answer the questions, and that the answers that she was giving were not true answers, and, while I would not deal with her hastily, I became convinced, if that was the case, I should deal with the witness for contempt of court, and perhaps in other directions, because that would be the plain duty of the court under such circumstances.

"Mr. Sparks: We take exception to those last remarks of the court, and in view of them we ask for the court to declare a mistrial and the withdrawal of a juror.

"The Court: The motion will be denied, and an exception will be noted on behalf of the defendants."

After some further testimony the court said:

"We will take a recess here for a few moments, and I ask the witness to examine that letter very carefully with respect to the paragraph and punctuation, the position of the typewriter worked on the paper, the width of the margins on each side, and the place where the typewriting work commences at the top and the place where there is space left at the bottom, where you start your second page there, and take what time you need, and then the court will argue, upon coming in here, whether you wrote that letter or not. Now, take it to the light in a side room by yourself; the court will furnish that, and take what time you want. We will take a little recess while you are doing that. (Short recess.)"

After recess:

"The Court: Gentlemen of the jury, the court was of the opinion that this witness wrote the letter that it had asked her to examine; that is, wrote it all on the typewriter. On going out counsel on both sides advised me that she did not write the letter, and the court was not justified in asking her to examine it in that view of the situation. So, gentlemen, please draw no unfavorable inference by reason of this error the court made. Counsel was merely inquiring as to the stamp, and I assumed she was the stenographer that wrote the whole letter, so it was the court's error.

"By Mr. Oeland: Q. After you have examined the stamp, what is your best judgment as to whether or not that is one of the stamps used by Mr. Rutherford?

"Mr. Sparks: I object to the form of the question; I object to best judgment. A conviction of the defendants cannot be based upon the witness' best judgment as to any particular fact—

"Q. What do you say, after careful examination, whether this was one of the stamps that were used? A. In all good conscience I could not say if that was one of the stamps that we used.

"Q. Would you say it was not? A. I would not.

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"By the Court: Q. What do you most think about it?
"Mr. Sparks: I object to it, as to form. (Objection overruled. Exception.)
"The Witness: I could not answer the question.
"Q. What are you most inclined to think about it? A. I cannot draw any conclusion conscientiously."

The government sought in the case of the witness William F. Hudgings to prove by him the signatures of the defendants Van Amburgh and MacMillan. He was asked:

"Direct examination by Mr. Oeland:
"Q. Do you know the signature of Mr. Van Amburgh? A. I have seen it many times.
"Q. Do you know the signature of MacMillan? A. I have seen it also.
"The Court: Have you seen him write?
"The Witness: I won't say I have seen him write.
"The Court: What is your best recollection as to whether you have seen him write?
"The Witness: I think I have never seen him write.
"The Court: Well, write anything—the signature or not?
"The Witness: I have not watched that.
"The Court: I did not ask you whether you ever saw them write; I want an answer yes or no.
"The Witness: I said 'No.'
"Q. Have you seen letters that they have signed and handed out? A. I have seen checks they have signed themselves, but not letters.
"Q. You have seen checks they signed? A. Yes, sir.
"Q. Is that right? A. Yes, sir.
"The Court: You have been there how many years?
"The Witness: About nine years.
"The Court: Continuously?
"The Witness: Yes, sir.
"The Court: And both these gentlemen have been there in that place of business nine years?
"The Witness: Almost continuously; yes, sir.
"The Court: And you tell us that you have never seen either of them write with a pen or pencil; never seen them in the act of writing?
"The Witness: No, sir; I never stood over their shoulder.
"The Court: I did not ask you where you stood. I asked, during that nine years, you tell us whether, upon your oath, that you never say either of these gentlemen in the act of writing. That is what the court asks you, sir.
"The Witness: I do not remember that I ever saw either of these gentlemen in the act of writing.
"The Court: What is your best recollection whether you ever did or not?
"The Witness: That is my best recollection.
"The Court: Tell us how your workshops, or your different places where you do your work, are located; how often are you in one another's presence?
"The Witness: I am very little in Mr. Van Amburgh's presence. His office is separated by a partition. I am more frequently in Mr. MacMillan's presence, but not to see him do any writing.
"The Court: And when you were in his presence, is he at his desk doing his work?
"The Witness: Part of the time.
"The Court: And during that entire nine years you never happened to see him in the act of writing?
"The Witness: Not that I can now recall. That is my best recollection.
"Q. I hand you Exhibit 31 for identification and ask you if at any time—I will ask you if that is a fac simile, a mimeograph copy of the signatures of MacMillan and Van Amburgh? A. It looks very much like it. * * *
"Q. Looking at the mimeograph signature there, what is your best opinion as to whether or not that is MacMillan's signature? A. It looks very much like Mr. MacMillan's signature.

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"Q. What is your best opinion? A. That would be my best opinion, but I might be mistaken.

"Mr. Sparks: I ask the court, in view of the fact that we have sat silent here under this examination of this witness, that it is no part of counsel's duty to suggest to any witness under examination, under the latitude that your honor allowed the government to cross-examine, to suggest or make any objections under the circumstances, and that his failure to recollect shall in no wise be taken as against—that they shall assume no hostile attitude as against the defendants for that reason.

"The Court: The requested instruction is denied.

"Mr. Sparks: Exception.

"The Court: I do not propose to stop and instruct this jury every two minutes, and at the request of the court I think that counsel for the government should ask this witness more about the opportunities and probabilities of his seeing this person write. It is a very extraordinary situation here. Very extraordinary testimony. It is very improbable. * * *

"The Court: Now, Mr. Witness, you do not mean that you have seen him write his signature? Have you ever seen him in the act of writing with a pen, pencil, or whatever the writing may be, or the signing of his name or writing anything else, writing in a book on any kind of book or paper or other material? Now, the question is whether you have ever seen him in the act of writing, not how much or how little, but whether you have ever seen him in the act of writing. That is the question this court wants you to answer.

"The Witness: I cannot answer 'Yes,' unless I knew it was a correct answer. Therefore I cannot answer 'Yes' to that question.

"The Court: Did you know him before you went there to work?

"The Witness: No, sir.

"The Court: So your acquaintance extends for a period of nine years?

"The Witness: Yes, sir.

"The Court: Did you go away on trips with him?

"The Witness: No, sir; not with him.

"The Court: Or in his company?

"The Witness: No, sir; that has probably occurred during the nine years.

"The Court: Been at hotels together?

"The Witness: During conventions I think that has occurred.

"The Court: Why do you say 'think'; don't you remember about that?

"The Witness: I do not recall that I have ever put up at hotels with Mr. Van Amburgh, but I would not say that I have not, because we have many conventions. * * *

"Q. Where was his desk with reference to your desk? A. It was in the same office, not a great distance apart.

"The Court: The same room?

"The Witness: Yes, sir.

"The Court: Your desk is in the same room his desk is in?

"The Witness: It is a very large room, about 20 or 30 desks.

"The Court: It is not so large but that you could see across it?

"The Witness: No, sir.

"Q. How far was your desk away from MacMillan's? A. About 10 feet, I think.

"Q. Anything intervening between you and MacMillan? A. No, sir.

"Q. You could see him sitting at his desk? A. My desk for the greater part has been with my back to Mr. MacMillan's desk, but recently it has been turned so it is alongside; that is, my side is toward Mr. MacMillan's desk, a little in front.

"Q. How far away from him? A. About 10 feet.

"Q. And you have been there within 10 feet of him for a year and a half? A. I guess it is about that long.

"Q. And you have never seen him writing with his pen?

"The Court (interposed): Or pencil?

"The Witness: I cannot say that I can recall that I have ever seen him in the act of writing. I would not say I have not, but I would not say that I have.

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"The Court (addressing the clerk): Have you any forms here committing a witness for contempt? Well, you direct the clerk to get up the commitment papers. This witness is going to be committed for contempt of court. The court is thoroughly satisfied, Mr. Witness, that you are testifying falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witnesses, especially with your wife. I believe—is that right, Mr. Judge Oeland?

"Mr. Oeland: Yes; she was one of the witnesses.

"The Court: And it becomes the plain duty of the court to commit you to jail, sir, for contempt, and, before doing so, I think it is the duty of the court to explain to you that the answer, 'I do not remember of ever having seen him write,' is just as false, is just as much a contempt of court, if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, 'I do not remember.' Now, we will adjourn here for a few moments. The court desires you to have every opportunity to correct your answers if you so desire to do so, and the court suggests that it would be very proper for you to talk with a lawyer about the situation. Counsel for the defense or counsel for the government or any one else you may desire to, but I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this court, and I am very sure it has, to deal with you in the manner proposed, I am going to do it. Now, a good many times a lay witness comes into court with the notion that, if they say they do not remember, that is a complete answer. I desire to inform you that that is not a complete answer, when the fact is that you do remember, or the fact is that you could not fail to remember. Now, we will take a recess for about 10 minutes.

"The Witness: Would it be proper for me to make a statement?

"The Court: You may make a statement, but it would be more prudent, I think, after you confer with some one, because you evidently have a wrong notion of this situation. Now, it is the duty of the court to be indulgent with you, and considerate with you, and give you every opportunity to do right. I would not like to have you, or any one else, think for a moment that that course will not be taken up. You see the situation is a very remarkable one, Mr. Witness, in having a desk in the same room with a man for so long, and transacting so much business with him, and being present when so much business has been transacted by him. The answer that you do not remember of ever seeing him write would be, in the opinion of the court, impossible, and when I say 'impossible,' that is a strong word; but the situation is so remarkable that I feel very sure that I am justified in that. Now, you are the third witness who has taken this course. Is it the fourth witness, Mr. District Attorney?

"Mr. Oeland: This is the third witness, your honor, and the Italian witness.

"The Court: Well, the Italian witness is not very well to be classed with him, I think.

"Mr. Oeland: No; I should not stick to it.

"The Court: And the court has sat here several days listening to this, and it becomes the plain duty of the court to commit you for contempt and deal with you otherwise, if necessary.

"Mr. Sparks: Before the recess I would like to make an objection.

"The Court: Yes; but this is dealing with the witness.

"Mr. Sparks: I understand, but I have the right at any stage of the case to make a motion such as I am going to make.

"The Court: Well, we will hear you.

"Mr. Sparks: In view of the fact that this has occurred at least three times during the trial of this case, and the court has expressed its opinion as to the truthfulness of the witnesses, the witness in each case claiming that they or she were doing the best they could to answer the questions put to them, in view of the fact that they could not state and answer the question from their own knowledge, and in view of the fact that the court has without any doubt indicated to the jury this witness was telling an untruth, and in each case telling them that unless they modify their testimony after an adjournment, I feel that these various occurrences have resulted in great

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prejudice to the defendants, and cannot help but affect the jury in their deliberations upon this case, when it finally goes to them, especially in view of the fact that these three witnesses are members of the same organization, that that will have its effect unconsciously, and there is nothing that the court can say to them, in view of these various occasions, which will eradicate this impression from their minds. I also object upon the ground that these witnesses have been called by the government itself, and the government is in no better position to impeach their own witnesses than any plaintiff or party in any civil suit, and this impeaching of the witness by the government is contrary to all the known rules of procedure on the question of impeachment, and we respectfully ask, in view of all the facts, to withdraw a juror.

"The Court: To what?

"Mr. Sparks: To withdraw a juror.

"The Court: Well, the motion is denied.

"Mr. Sparks: I take an exception.

"The Court: And in denying the motion the court desires to say that this is not an extraordinary procedure in the least. Nothing has been done to violate the rules as to impeachment of witnesses. The court has a right to express its opinion in the circumstances of the present situation. If the court fails to do so, it would not do its duty. The court has even a right to express its opinion as to the way the verdict should go in a case in this court. I never exercised that right, and if the course suggested by counsel for the defendants was the proper course to pursue, then in any trial the government could be defeated, or in civil suit a plaintiff or defendant might be defeated in his case or in his defense, because a witness comes in and says 'I do not remember,' would be unable to proceed and complete the trial of any case. That would be giving a witness or witnesses the power to stop all proceedings in court. And as is said in this motion, gentlemen, as to prejudicing you against the defendants, there is no evidence in the case that any of these defendants are responsible for this witness' testimony. There is no evidence in the case to justify you in drawing the inference that any of these defendants are responsible for the attitude taken by the witness, so you should not draw any inference against the defendants. The young man on the stand is a witness called by the government. Whatever their relations may be, as appears by the testimony, would not warrant the court or the jury in charging this up, so to speak, to the defendants, or any of them; so you should be very careful not to let the conduct and the testimony of the witness in the respect indicated work any harm against any of the defendants. Now, before we take our recess, Judge Oeland, I wish you would ask him how long they have had their desks in the same room. I understood him to say one time more than a year and a half.

"Mr. Oeland: That is the way I understood him.

"The Court: I understood him another time to say a year and a half.

"Mr. Sparks: Nothing in the court's remark in reference to my motion can be deemed by me to have cured the situation which I assume to exist.

"The Court: Not in the least. The motion is denied, and what the court said is in explanation of the ruling it made in denying the motion.

"By Mr. Oeland: Q. How long have you been within 10 feet—your desk being within 10 feet of Mr. MacMillan? A. About a year and a half.

"The Court: How long has your desk been in the same room with Mr. MacMillan?

"The Witness: About a year and a half.

"The Court: Before this year and a half, did you occupy different rooms or workshops?

"The Witness: He was not there; he had no desk.

"The Court: What kind of a desk do you work at, whether roll top or flat top?

"The Witness: Roll top.

"The Court: And what kind of a desk does Mr. MacMillan work at, whether roll top or flat top.

"The Witness: Roll top when he is there.

"The Court: I did not ask you when he was there. Are there any other desks in this room?

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"The Witness: Yes, sir; about 30.
"The Court: About 30 desks?
"The Witness: Yes, sir. * * *
"The Court: Well, you have been away attending these meetings and conventions; have you dined with him?
"The Witness: On some occasions.
"The Court: In a dining car?
"The Witness: No; I do not think we have been in a dining car together.
"The Court: In hotels?
"The Witness: I think we have been in a hotel together, but not in the same room.
"The Court: Never dined with him in a hotel on the European plan, in a restaurant where you make out—or a railway dining car where you make out—a schedule of the things to be served. Did you see him write?
"The Witness: I think not.
"The Court: Does he carry a little pocket memorandum book?
"The Witness: I could not say.
"The Court: Did you ever see him write in that?
"The Witness: I do not know that he carries one.
"The Court: You cannot tell about that?
"The Witness: No, sir.
"The Court: Tell the court whether you care to take any further time on this matter, do you?
"The Witness: My time is your time.
"The Court: I suggest that you might confer with counsel.
"The Witness: No, sir; my answers will be exactly as they have been.
"The Court: Very well. You are adjudged to be in contempt of this court and you are ordered to be committed to jail forthwith. Mr. Clark, you prepare the commitments. You are in the custody of the marshal from now on. And you may call the next witness."

Subsequently the court said:

"The Court: Well, gentlemen of the jury, I should say the action of the court in this regard should not be considered by you. You should draw no inference against these defendants, because there is no evidence in the case warranting it at the present time, and you will give attention, Mr. Reporter, to transcribing this testimony, in order that it may be used this afternoon. We will stop here for about 10 minutes in order that we may obtain another reporter.
"Mr. Sparks: Will your honor have an exception noted for all of these defendants?
"The Court: Certainly. All of these defendants, so far as they are entitled to an exception to this proceeding against the witness, and not against the defendant."

June 11, 1918, the witness was committed for contempt, and remained in prison until April 14, 1919, when he was discharged by the United States Supreme Court upon a writ of habeas corpus on the ground that his testimony, even if false, did not obstruct the court in the performance of its judicial duties. In re Hudgings, April 14, 1919. Mr. Justice White said:

"Testing the power to make the commitment which is under consideration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone, without reference to any circumstance or condition giving to it an obstructive effect. Indeed, when the provision of the commitment directing that the punishment should continue to be enforced until the contempt—that is, the perjury—was purged, the impression necessarily arises that it was assumed that the power existed to hold the witness in confinement under the punish-

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ment until he consented to give a character of testimony which in the opinion of the court would not be perjured.

"In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of opinion that the case is an exception to the general rules of procedure to which we have at the outset referred, and therefore that our duty exacts that we finally dispose of the questions in the proceeding for habeas corpus which is before us. It is therefore ordered that the petitioner be discharged."

We think that the attitude of the court in regard to the testimony of these three witnesses and the action it took in the presence of the jury in the case of the witness William F. Hudgings was most prejudicial to the defendants. It was very likely to intimidate witnesses subsequently called, to prejudice the jurors against the defendants, and to make them think that the court was satisfied of the defendants' guilt. What a judge may say to the contrary on such an occasion will not necessarily prevent such consequences. It is not enough to justify a conviction that the defendant be guilty. He has a right to be tried in accordance with the rules of law. The defendants in this case did not have the temperate and impartial trial to which they were entitled, and for that reason the judgment is reversed.

MANTON, Circuit Judge. I dissent. As stated in the prevailing opinion, the plaintiffs in error (hereinafter called the defendants) were officers or employés of the Watch Tower Bible & Tract Society, the People's Pulpit Association, and the International Bible Students' Association, corporations under which, it is alleged, they were engaged in following a religious belief. While our country was at war, and before the armistice was signed, the defendants were tried and convicted on an indictment containing the four following counts:

First Count. A conspiracy to cause insubordination, etc., in the military and naval forces of the United States.

Second Count. A conspiracy to obstruct the recruiting and enlistment service of the United States.

Third Count. An attempt to cause insubordination, etc., in the military and naval forces of the United States.

Fourth Count. Obstructing the recruiting and enlistment service of the United States, etc.

The offenses charged were committed between June 16, 1917, and May 6, 1918. The corporations, acting through their officers and employés, who were indicted, between June 30, 1917, and March, 1918, caused to be published 850,000 copies of a book called "The Finished Mystery." These copies were distributed in large numbers in the army camps of the United States, and many hundreds of thousands of copies were distributed throughout the United States and Canada. The book purported to be an interpretation of the Book of Revelations and the Book of Ezekiel. The book has taken the shape of a small bible or prayer book. The first half is devoted to many quotations, with interpretations, from the Scriptures. Then, in about the center of the book,

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are found writings, placed there in a very insinuative manner, of which the following extracts are a type:

"Standing opposite to those Satan has placed three great untruths, human immorality, the Antichrist and a certain delusion which is best described by the word Patriotism, but which is in reality murder, the spirit of the very Devil. * * * Under the guise of Patriotism the civil governments of earth demand of peace-loving men the sacrifice of themselves and their loved ones and the butchery of their fellows, and hail it as a duty demanded by the laws of heaven." Page 247.

"If you say that this war is a last resort in a situation which every other method, patiently tried, has failed to meet, I must answer that this is not true—that other ways and means of action, tried by experience and justified by success, have been laid before the administration and willfully rejected.

"'In its ultimate causes, this war is the natural product of our unchristian civilization.' * * * There is not a question raised, an issue involved, a cause at stake, which is worth the life of one blue-jacket on the sea or one khaki-coat in the trenches." Page 251.

At about this stage, the fertile mind of the reader would be very much interested, if sanctimonious at all. At this stage, he is supplied this food of poison for his patriotism and loyalty to his country. Under the mockery of religion or religious teaching, I can conceive of no worse thrust at America and at America's needs, at the time of the publication of this book, than that which was published in this book by the defendants. We in America all accord to men of all religious faiths the right to an honest and faithful belief in their creed and the practice of it accordingly, but that the defendants' efforts were intentional and for the desired purpose is apparent from a mere recital of some of the happenings during this period.

The defendant Rutherford wrote on July 17, 1917, referring to The Finished Mystery:

"It seemed good to the Lord to have the seventh volume prepared. * * * When the time came for publishing this work we were in the midst of much opposition, and knowing that to consult the opposers would hinder the publishing of the volume, I took counsel with Brothers Van Amburgh, MacMillan, Martin, and Hudgings of the office force."

The book was paid for out of the funds of the corporation with which the defendants were associated and which they managed. The effect of the book upon the drafted men is exemplified by some of these circumstances. As instances:

One Dutchess, formerly a National Guardsman, sold a copy of the book to one Sisson of Binghamton, N. Y. The latter claimed exemption later before the local board as a conscientious objector and was aided in this by the defendant Van Amburgh.

One Insberg was drafted and sent to Camp Devens in October, 1917. After purchasing the book, he refused to perform any military duty. He later bought a dozen volumes of the book and put them in the library of the Young Men's Christian Association at Camp Devens. Later he deserted.

One De Cecca was drafted, sent to Camp Devens, took a copy of the book with him, and then refused to work in camp.

One Niciti was drafted, sent to Camp Devens, got 30 copies of the

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book, distributed them in camp. After he put on his uniform, he took it off and refused to do any work in camp.

One Anderson was drafted and sent to Camp Upton. After reading the book, he deserted, came to the Tabernacle (defendants' establishment), and while there an army officer was looking for him. He saw the officer; used the fire escape as a means of escaping from the building.

The record is replete with evidence indicating the defendants' active advising men subject to the draft to claim their exemption and to refuse to perform any duty in camp if they were drafted.

A pamphlet was later published, called the Bible Students' Monthly, and this by the Watch Tower Bible & Tract Society. An article therein was as follows:

"Young man, the lowest aim of your life is to be a good soldier. A good soldier never tries to distinguish right from wrong. * * * A good soldier is a blind, heartless, soulless, murderous machine. He is not a man; he is not even a brute, for brutes only kill in self-defense. * * * No man can fall lower than a soldier. It is a depth beneath which we cannot go."

Ten thousand copies of this monthly containing this quotation were reprinted in October, 1917, and paid for by defendants in the name of the Watch Tower Bible & Tract Society.

The guilt of the defendants is plain, and I do not understand that the majority of the court are of the opinion that the facts did not warrant this conclusion of the jury.

But this judgment is to be reversed because of the alleged adverse attitude of the court in regard to the testimony of three witnesses, Mrs. Mabel Campbell, Mrs. Agnes Hudgings, and William F. Hudgings, and the action taken by the court in the presence of the jury in the case of the witness Hudgings in committing him for contempt of court, saying it was so prejudicial to the defendants that it could not be cured by the many words of caution expressed by the trial judge.

In order to establish its case, the government found it necessary to call as witnesses employés and others who were attached to and associated with the defendant corporations. Mrs. Mabel Campbell was a stenographer for the defendants. She had written letters, carbon copies of which were taken from the defendants by a search warrant. She identified initials on the letters, and was placed on the witness stand to identify the letters. She refused to identify the letters. The court was apparently of the opinion that she was not telling the truth, and from the recital of what took place, as this record discloses, the court was undoubtedly correct in this conclusion.

Agnes Hudgings, also a stenographer, wrote certain letters to which she attached initials which she used in her course of business conduct in writing such letters; letters indicating the initials of the person who dictated the letter. She was the wife of one of the officers of the association. She refused to identify the letters, and the court, having reached the conclusion that she was not telling the truth, did not hesitate to tell her that she was evading and fencing, and not frank and truthful. Whatever was said by the court in his questions was at once

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followed by directing the jury not to permit it to prejudice any one; that it should not reflect against the defendants or the government, for nothing appeared, he said, indicating that the defendants or the defendants' counsel were responsible for the attitude taken by the witnesses, the two stenographers.

Hudgings was called as a witness to identify the handwriting of one of the defendants, MacMillan. He was in close association in the same office, sitting within 10 feet of the desk occupied by MacMillan for two years, and declared that he could not identify the handwriting of either MacMillan or Van Amburgh.

At this stage of the trial, the conduct of the witnesses who were called, and who were associated with the defendants, became so palpable that the court properly told the witness he was not telling the truth. He ordered him committed for contempt of court. At once the court instructed the jury:

"There is no evidence in the case to justify you in drawing the inference that any of the defendants are responsible for the attitude taken by the witness, so that you should not draw any inference against the defendants."

The right to commit for contempt of court, or to summarily cause the arrest of a witness for perjury, is well recognized and approved by our courts. Of course, there must be facts justifying the contempt proceedings. This rule was recently laid down in Re Hudgings, 249 U. S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656, decided April 14, 1919, by the Supreme Court of the United States. In this recent decision of the Supreme Court, the power to commit for contempt, when the circumstances warranted it, was recognized; but it was held that in the particular instance of Hudgings the circumstances did not warrant his commitment.

Throughout the trial, the court constantly protected the defendants' rights by frequent caution, and in many instances he asked the jury not to be prejudiced because of occurrences which took place during the course of the trial, which the court felt might in some way prejudice the defendants. And again, in the charge to the jury, the court left with the jury the statement that he had no opinion as to the facts, and that the facts were for the jury solely, and that no unfavorable inferences should be drawn by reason of any statement made by the court, nor should they be influenced by anything that occurred during the course of the trial. The rule has long been established that the trial judge of the District Court has wide latitude in the conduct of a trial; he may even comment upon the weight of evidence; so, too, he may comment upon the conduct of the witnesses and of counsel. Simmons v. United States, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; Vicksburgh, etc., Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 118, 30 L. Ed. 299; Lovejoy v. United States, 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389; Breese v. United States, 106 Fed. 680, 45 C. C. A. 535; Smith v. United States, 157 Fed. 721, 85 C. C. A. 353.

Indeed, it is my opinion that the learned District Judge was most patient and considerate of the defendants' rights. His consideration of defendants' counsel, who in their zeal to protect their clients' interest

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many times overstepped the bounds of due respect to the dignity of the court, was magnanimous and kindly.

I see no error warranting a reversal of this conviction in the conduct of the trial judge, and in my opinion the judgment should be affirmed.

(258 Fed. 867)

HICKSON v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1919.)

No. 1709.

1. WAR ⟸4—ESPIONAGE ACT—INDICTMENT FOR VIOLATION.
   In an indictment for violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), by willfully making false reports or statements with intent to interfere with the operation or success of the military or naval operations of the United States, when the United States was at war, it is unnecessary to aver that such statements were made in the presence or hearing of persons in the military or naval service, or subject to military or naval duty.
2. WAR ⟸4—ESPIONAGE ACT—VIOLATION.
   Evidence *held* to sustain a verdict finding defendant guilty of violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c) by making false statements with intent to interfere with the military or naval operations of the United States when at war.
3. CONSTITUTIONAL LAW ⟸90—WAR ⟸4—ESPIONAGE ACT—FREEDOM OF SPEECH.
   The Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), is not unconstitutional in making criminal in time of war statements or utterances which in time of peace might be within the constitutional rights of a citizen.
4. CRIMINAL LAW ⟸1218—EXECUTION OF SENTENCE—FEDERAL COURTS.
   Unless a defendant convicted of crime is sentenced to imprisonment for a period longer than one year, or to hard labor, a federal court is without authority to order the sentence executed in a state penitentiary.
5. CRIMINAL LAW ⟸1188 — UNAUTHORIZED SENTENCE — CORRECTION BY APPELLATE COURT.
   Where a federal court has exceeded its authority in the sentence imposed on a convicted defendant, the error may be corrected by the appellate court by remanding the cause for appropriate sentence.

In Error to the District Court of the United States for the Western District of South Carolina, at Rock Hill; Charles A. Woods, Judge.

Criminal prosecution by the United States against F. C. Hickson. Judgment of conviction, and defendant brings error. Reversed with directions.

Cornelius Otts, of Spartanburg, S. C. (J. K. Henry, of Chester, S. C., on the brief), for plaintiff in error.

C. G. Wyche, Asst. U. S. Atty., of Greenville (J. William Thurmond, U. S. Atty., of Edgefield, S. C., on the brief), for the United States.

Before PRITCHARD and KNAPP, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge. This was a criminal action instituted in the District Court of the United States for the Western District of South Carolina.

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The defendant was tried on an indictment containing seven counts, in which he was charged with willfully, unlawfully, and feloniously making and conveying certain false reports and statements while the United States was at war with the Imperial German government, with intent to interfere with the operations and success of the military and naval forces of the United States, and to promote the success of the enemies of the United States.

On motion of counsel, the court directed a verdict of not guilty on the second, fourth, and fifth counts of the indictment and submitted to the jury the first, third, sixth and seventh counts, and counsel for defendant, took an exception to the refusal of the Court to direct a verdict of not guilty as to all the counts of the indictment. The jury returned a verdict of not guilty on the third and seventh counts, and returned a verdict of guilty on the first and sixth counts of the indictment.

The statute under which plaintiff was convicted is what is known as the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 219 (Comp. St. 1918, § 10212c) and is in the following language:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

[1] The first four assignments of error relate to the demurrer to the indictment and the motion to direct a verdict. It was contended that the indictment did not allege and that the proof did not show that the remarks made or the newspaper article were delivered to any member of the military or naval forces or those subject to draft. The defendant's contention is that the indictment should have alleged that the language used was directed to or used in the presence of enlisted men of the army or navy of the United States or those within the draft age. We think this question was disposed of adversely to the contention of defendant's counsel by this court in the case of H. E. Kirchner v. United States, 255 Fed. 301, 166 C. C. A. 471. The court in that case, in passing upon this question, among other things, said:

"The remaining objections to the indictment are founded on the theory that the false statement must be made to, or at least within the hearing of, persons who are, or who are liable to become, members of the military or naval forces. We find no warrant for this contention in the statute. The success of the military and naval forces is aided or hampered in large measure by the spirits of the civilian population. Shipbuilders, munition makers, coal miners, lumber producers, buyers and sellers of Liberty Bonds and War Saving Stamps, women and girls making Red Cross supplies, merely begin the list of civilians whose patriotic ardor is almost as essential to the success of our military and naval forces as is the spirit of the men composing these forces. Excepting only those who are too unintelligent to understand, there is no class of our population on whom some false statements may not have a pernicious effect in the direction of restraining patriotic endeavor. In

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drawing the indictment it was unnecessary for the pleader to negative the fact that the statements alleged against the defendant were made only in the hearing of those too unintelligent to understand them. The return of the indictment necessarily imported that the defendant's statements were made to some person who understood them, and repeated them before the grand jury. It follows that, unless the false statement be made only to children of very tender years or to imbeciles, the intent to interfere with the operation or success of the military or naval forces may exist.

"The crime denounced is not that of interfering with the success of our forces. If the false statement is willfully made with the intent denounced, the offense is complete; and if the effect of the statement may reasonably be to chill the ardor or restrain the efforts of any of those who hear the statement, the prescribed intent may exist. The statute does not discriminate between an intent to directly interfere * * * with the operation or success of the military forces. And hence we have no reason for making such distinction."

In support of its contention the court cited a number of other decisions reported in the bulletins entitled "Interpretation of War Statutes."

The fifth assignment is to the effect:

[2] (a) That there was no proof of any false statement in the alleged newspaper article set out in the sixth count, or

(b) That any word or utterance of defendant was made with intent to create mutiny, disloyalty, or insubordination in the military or naval forces of the United States, and it is urged that the court below erred in not directing a verdict in favor of the defendant.

On these grounds the court below in refusing the motion for a new trial said:

"I could not resist the conclusion, however, that it was fair to submit it to the jury, that I was obliged to submit it to the jury, whether when the defendant said: 'When the flag of my country is never sacred except when used as the red flag in the bull-pen to tease the beast to fight,' that that meant certainly by the strongest insinuation and inference, that that meant that the flag of his country had been used to tease the people into patriotism and into the spirit of fighting, that it had been falsely presented to them, that the issue had been so falsely represented that the flag was used to tease them into the fighting spirit. That was a legitimate inference the jury might draw, and I could not see my way clear to withdraw that from the jury."

As to this assignment we are of opinion that it was a question for the jury to decide as to whether the following statement was true.

"It was wrong for this country to be drawn into the war, and that Woodrow Wilson was the man that did it; that it was a money-making propaganda, and the steel men, and the big men, and the big office holders were the ones that were getting the benefit of it, and that he bet Woodrow Wilson was getting his drag, and that he should be assassinated; that it was wrong for one man to say what the whole country should do."

This was an unwarranted and reckless statement, and one that should never be indulged in by a citizen of this government.

The jury having passed upon this question, we are not inclined to interfere with the verdict.

By the sixth assignment is insisted that the evidence did not warrant a verdict of "Guilty." This was also a question of fact as to the intent of the defendant at the time he made the remark, concerning which witnesses testified. The court's charge bearing on this point was

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fair and impartial, leaving, as it did, the question of intent to be determined by the jury. The jury having found the facts in pursuance of the instructions given we think the assignment is without merit.

The seventh assignment relates to the refusal of the court below to grant a new trial on the ground that the jury was unduly influenced in that one juror was biased and incapable of rendering a true verdict.

The learned judge, who heard this case, in referring to this phase of the question, said:

"All that I think that the remark in question meant was that this was a case in which soldiers were particularly interested. They were particularly interested in finding a true verdict, that those who had done anything to interfere with the military operations of the government should be punished for it. It did not imply that those soldiers were interested in having a false or prejudiced verdict. It would have been better perhaps for him not to have said anything about it, and as it turned out it would have been better for Mr. Thurmond had he not made any interrogation. I cannot think there was any impropriety in the course he pursued. If the juror had been accused of anything that was improper I should have had him summoned here, but I do not think there was anything improper in his conduct."

We think that the above-statement of the court is a full and complete answer to the contention of the defendant as respects this point.

[3] The eighth, ninth, and eleventh assignments of error are based on the ground that the Espionage Act as interpreted by the court below is unconstitutional. This question was decided by the Supreme Court of the United States in the case of Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470 (decided March 3, 1919, and reported in the Advance Sheets). In that case the court held that the law was constitutional. Justice Holmes in speaking for the court, among other things, said:

"But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in Patterson v. Colorado, 205 U. S. 454, 462, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. Aikens v. Wisconsin, 195 U. S. 194, 205, 206, 25 Sup. Ct. 3, 49 L. Ed. 154. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck Stove & Range Co., 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The question in every case is whether the words used are used in such circumstances as are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in section 4 * * * punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking or circulating a paper), its tendency and the

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intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. Goldman v. United States, 245 U. S. 474, 477, 38 Sup. Ct. 166, 62 L. Ed. 410. Indeed that case might be said to dispose of the present contention if the precedent covers all media concludendi. But as the right to free speech was not referred to specially, we have thought fit to add a few words."

This point was also decided March 10, 1919, in Jacob Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 240, 63 L. Ed. 561, Advance Sheets. Mr. Justice Holmes, in speaking for the court, said:

"With regard to that argument we think it necessary to add what has been said in Schenck v. United States, only that the First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language. Robertson v. Baldwin, 165 U. S. 275, 281, 17 Sup. Ct. 326, 41 L. Ed. 715. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

The tenth assignment of error is to the effect that the jury was inconsistent in finding the defendant not guilty as charged in the third and seventh counts, and at the same time finding him guilty in the first and sixth counts. This question was not presented to the court below. Indeed, it appears to be an afterthought of counsel. These crimes are separate and distinct, and the findings of the jury as to one cannot be said to be inconsistent with its findings as to the others.

A careful examination of the record shows that the jury was amply warranted in finding as it did. The charge of the learned judge who heard the case was fair and impartial. Therefore we are impelled to the conclusion that there is no error as respects the rulings of the court below.

[4] In conclusion, there is one matter not mentioned in the assignments of error, to which we will refer briefly. It appears that the defendant was sentenced to the penitentiary for a term of six months. We think this was unauthorized. This question was passed upon in the case of In re Bonner, Petitioner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149. The court in discussing this phase of the question, said:

"Section 5356 of the Revised Statutes of the United States [Comp. St. § 10460], under which the defendant was indicted and convicted, prescribes as a punishment for the offenses designated fine or imprisonment—the fine not to exceed $1,000 and the imprisonment not more than one year, or by both such fine and imprisonment. Such imprisonment cannot be enforced in a state penitentiary. Its limitation, being to one year, must be enforced elsewhere. Section 5541 of the Revised Statutes [section 10527] provides that: 'In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the Legislature of the state for that purpose.' And section 5542 [section 10528] provides for a similar imprisonment in a state jail or penitentiary where the person has been convicted of any offense against the United States and sentenced to imprisonment and confinement at hard labor. It follows that the court had no jurisdiction to order an imprisonment, when the place is not specified in the law, to be executed in a penitentiary when the imprisonment is not ordered for a period longer than one year or at hard labor. The statute is equivalent to a direct denial of any authority on the part of the court to direct that imprisonment

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be executed in a penitentiary in any cases other than those specified. Whatever discretion, therefore, the court may possess, in prescribing the extent of imprisonment as a punishment for the offense committed, it cannot, in specifying the place of imprisonment, name one of these institutions. This has been expressly adjudged in Re Mills, 135 U. S. 263, 270 [10 Sup. Ct. 762, 34 L. Ed. 107], which, in one part of it, presents features in all respects similar to those of the present case."

[5] In the case of Mitchell v. United States, 196 Fed. 874, 116 C. C. A. 436, the Circuit Court of Appeals for the Ninth Circuit, in referring to the question as to whether one under circumstances like the case at bar is entitled to a final discharge, said:

"But the error in the judgment does not entitle the plaintiff in error to his discharge, as it might if the question were presented on a writ of habeas corpus. The case having come to this court on writ of error, this court, while reversing the judgment of the court below, may remand the cause to that court, with directions to enter the appropriate judgment. Murphy v. Massachusetts, 177 U. S. 155, 20 Sup. Ct. 639, 44 L. Ed. 711; Haynes v. United States, 101 Fed. 817, 42 C. C. A. 34; Whitworth v. United States, 114 Fed. 302, 52 C. C. A. 214."

As we have stated, the other assignments of error as to the rulings of the court below are without merit. However, from what we have stated as to this point, it necessarily follows that the judgment of the court below should be reversed and the cause remanded, with directions to enter such judgment on the verdict of the jury as the justice of the case requires and the acts of Congress authorize.

(258 Fed. 872)

UNITED STATES v. SAFE INVESTMENT GOLD MINING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 19, 1919.)

No. 5010.

1. PUBLIC LANDS ⟸120—SUIT FOR CANCELLATION OF PATENT—FRAUD.
While the United States has the same remedy in equity for cancellation of a patent for fraud that an individual would have in case of his own deed, it has the burden of proof, and is subject to the same rule that the evidence must be clear and convincing.

2. MINES AND MINERALS ⟸45—CANCELLATION OF PATENT—PROOF OF FRAUD.
Evidence in a suit for cancellation of a mineral patent for fraud *held* insufficient to overcome the presumption in favor of the validity of the patent, or to show that representations made in the application for patent were willfully and knowingly false, or that they were relied on by the government officers.

3. MINES AND MINERALS ⟸17(1)—MINING CLAIMS.
The words "discovery of the vein or lode," as used in Rev. St. § 2320 (Comp. St. § 4615), in prescribing the prerequisites of a valid mineral location, owing to the varying conditions to which the expression must be applied, has no rigidly fixed meaning.

4. PUBLIC LANDS ⟸120—SUIT FOR CANCELLATION OF PATENT—ISSUES.
Where a suit by the government for cancellation of a patent is based upon fraud, plaintiff will be confined as a general rule strictly to that issue.

Carland, Circuit Judge, dissenting.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit by the United States against the Safe Investment Gold Mining Company and Frank Steiskal, trustee. Decree for defendants, and complainant appeals. Affirmed.

George E. Trowbridge, Asst. Sol., Department of Agriculture, of Denver, Colo., and E. W. Fiske, Asst. U. S. Atty., of Sioux Falls, S. D., for the United States.

J. M. Hodgson, of Casper, Wyo., for appellees.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

BOOTH, District Judge. This is a suit to cancel, for fraud, a patent issued by the United States August 20, 1908, covering 61 lode-mining claims, containing about 1,118 acres, embraced in mineral survey No. 1894, situated in Lawrence county, S. D. The fraud alleged is false representations knowingly made to the officers of the United States General Land Office at the time of the application for the patent. Voluminous testimony was taken before a special examiner appointed by the court. Upon the trial the bill was dismissed upon the merits for want of equity.

The evidence discloses that the Safe Investment Gold Mining Company, hereinafter called the Mining Company, was a corporation organized under the laws of South Dakota. It became the owner of the Pyrites lode-mining claim, mineral survey No. 591, in the county of Lawrence, S. D. Adjoining this Pyrites lode lies the land making up mineral survey No. 1894, involved in this suit. Of the claims going to make up this survey, 8 were located by Ole Christopher, 13 by I. A. Webb, 4 by C. M. Woodbridge, 6 by John Peterson and A. A. Moodie, 20 by J. F. Sawyer and S. Cresswell, and 10 by the Mining Company itself. Apart from the claims located by the company, all but 6 of the others had been located prior to the organization of the company. Webb and Woodbridge were connected with the company from its organization; the other locators had no connection therewith.

Having acquired ownership of the claims, and having caused an official survey to be made of the property, and the same having been designated by the Surveyor General of South Dakota as mineral survey 1894, the company, on November 23, 1905, authorized Webb, one of its directors, as attorney in fact, to make application for a patent, and to take the necessary steps in connection therewith. The application for patent was filed June 29, 1906. The land being within the limits of the Black Hills National Forest, the Forest Supervisor ordered an examination and report. This report was made July 27, 1906, and approved August 2, 1906. On September 4, 1906, a protest against the application for the patent was filed by the Forest Supervisor, but was withdrawn September 26th. On November 30, 1907, the receiver's final receipt was issued. August 20, 1908, the patent issued.

April 28, 1911, the bill of complaint was filed herein. The bill alleged a conspiracy on the part of the officers of the Mining Company

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to defraud the United States. The evidence in the record as to a conspiracy is not, in our judgment, sufficient to justify a discussion as to this element of the case. The fraud claimed is alleged to have been committed by the officers of the defendant Mining Company. It centers around I. A. Webb, one of the directors. No fraud is alleged on the part of the officers or employés of the government. The alleged fraud consists of false representations claimed to have been knowingly made in connection with the application for the patent, and relates specifically to two matters—the discovery, required by section 2320, R. S. (Comp. St. § 4615), and the amount expended for labor or improvements required by section 2325, R. S. (Comp. St. § 4622), and amendments thereto.

[1] The rules of law applicable to such cases are well settled.

"The United States has the same remedy in a court of equity to set aside or annul a patent for land, on the ground of fraud in procuring its issue, which an individual would have in regard to his own deed procured under similar circumstances." United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110; McCaskill Co. v. U. S., 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590; Milner v. United States, 228 Fed. 431, 143 C. C. A. 13.

But the burden of proof rests upon the government, even though the establishment of a negative be required; and the evidence must be clear and convincing. In the case of United States v. Stinson, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724, the court said:

"While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established:

"First. The respect due to a patent, the presumption that all the preceding steps required by law have been observed before its issue, the immense importance and necessity of the stability of titles depending upon these official instruments, demands that suits to set aside or annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof. Maxwell Land Grant Case, 121 U. S. 325 [7 Sup. Ct. 1015, 30 L. Ed. 949]; Colorado Coal Co. v. U. S., 123 U. S. 307 [8 Sup. Ct. 131, 31 L. Ed. 182]; U. S. v. San Jacinto Tin Co., 125 U. S. 273 [8 Sup. Ct. 850, 31 L. Ed. 747]; U. S. v. Des Moines, etc., Co., 142 U. S. 510 [12 Sup. Ct. 308, 35 L. Ed. 1099]; U. S. v. Budd, 144 U. S. 154 [12 Sup. Ct. 575, 36 L. Ed. 384]; U. S. v. American Bell Tel. Co., 167 U. S. 224 [17 Sup. Ct. 809, 42 L. Ed. 144].

"Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' Maxwell Land Grant Case, supra [121 U. S.] 381 [7 Sup. Ct. 1015, 30 L. Ed. 949]; United States v. Iron Silver Mining Co., 128 U. S. 673, 677 [9 Sup. Ct. 195, 32 L. Ed. 571]; United States v. Des Moines, etc., Co., supra [142 U. S.] 541 [12 Sup. Ct. 308, 35 L. Ed. 1099].

"Third. It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser, for value, without notice; and, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the government, but also will protect the rights and interests of innocent parties. U. S. v. Burlington & Missouri River R. R. Co., 98 U. S. 334, 342 [25 L. Ed. 198]; Colorado Coal Co. v. U. S., supra [123 U. S.] 313 [8 Sup. Ct. 131, 31 L. Ed. 182]."

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To the same effect: Diamond Coal Co. v. United States, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936; Washington Securities Co. v. United States, 234 U. S. 76, 34 Sup. Ct. 725, 58 L. Ed. 1220; Burke v. So. Pac. R. R., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527; Wright-Blodgett Co. v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637; United States v. Beaman, 242 Fed. 876, 155 C. C. A. 464; United States v. Porter Fuel Co., 247 Fed. 769, 159 C. C. A. 627.

[2] The statements made by Webb in the application for patent which are now challenged for fraud are as follows:

"That in virtue of a compliance with the mining rules, regulations, and customs, by the said Safe Investment Gold Mining Company, applicant for patent herein, has become the owner of, and is in the actual, quiet, and undisturbed possession of the Oregon No. 26 and other lodes, M. S. No. 1894, as herein described, linear feet of the vein, lode, or deposit, bearing gold, together with surface ground 600 feet in width, for the convenient working thereof, as allowed by local rules and customs of miners."

And:

"Deponent further states that the facts relative to its right of possession to said mining claim, vein, lode, or deposit and surface ground so surveyed and platted are substantially as follows, to wit: Discovery, location, and purchase, which more fully appear by reference to the copy of the original record of location and the abstract of title hereto attached and made a part of this affidavit; the value of the labor done and improvements made upon said Oregon et al. lodes, M. S. No. 1894, claim, by it and its grantors, being equal to the sum of five hundred dollars upon and for the benefit of each claim embraced in this survey; and said improvements consist of shafts, drifts, tunnels, and crosscuts."

It is contended by plaintiff that, inasmuch as the land in question was within the limits of a national forest, patent therefor could issue only upon proof of a discovery of mineral in such quantity and of such value as to show the land to be more valuable on account thereof than for national forest purposes. And it is claimed that defendant Mining Company in its application for patent, by the statements above set out, falsely and fraudulently represented that it had made on each of the claims a discovery of mineral of sufficient value to show that the lands were more valuable for mineral than for national forest purposes.

It is further contended by plaintiff that the application for patent, by the statements above set out, falsely and fraudulently represented that a well-defined vein or lode carrying mineral of value had been discovered on the claims in question, whereas in truth no such vein or lode had been discovered. The bill of complaint alleges:

"The plaintiff's said officials believed and relied upon said false and fraudulent representations and were deceived thereby, and were at all times prior to the issuance of said patent in ignorance of the aforesaid fraudulent character of said mineral entries, application, and proofs, and of the character of the said lands, and because of said belief, reliance, deception, and ignorance, and not otherwise, caused the said application to be allowed and the said receiver's receipt, register's certificate, and patent to be issued in the manner and form as herein alleged."

The evidence bearing upon Webb's representation as to discovery was substantially as follows: The land in question was in the min-

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eral belt of the Black Hills, and was not dissimilar in character to the formation at the Homestake Mine. The general mineral character of the country was recognized. Gold had been found on the adjoining Pyrites claim in considerable quantities. Twenty-five of the claims included in mineral survey 1894 had been located in the period from 1898 to 1902, and had been acquired by the Mining Company between October, 1904, and March, 1905. The location certificates covering these claims had been filed as required by the statutes of South Dakota, and no question had been raised as to the validity of the locations. Presumptions were in their favor. Discovery holes were dug upon the other claims, in accordance with the statutory requirements. Witnesses for the plaintiff who had worked in digging these holes testified that, while rock in place was found upon these latter claims, there was no true fissure or vein carrying minerals of value; that no free gold was obtained by panning; that assays of samples taken from the discovery holes showed traces of gold. Webb, who was called as witness for plaintiff, testified that his information, from the men who had delved into the ground upon these claims, was that the claims contained ore bodies; that he knew they contained ore bodies; that "there were veins all through there." Witnesses for the plaintiff, who later examined the claims, testified that they found no true mineral-bearing veins or lodes which would pay to mine. Witnesses for the defendant testified that such mineral-bearing veins and lodes did exist, and in some instances contained ore of commercial value; that veins could be traced extending from the Pyrites lode to the Oregon claims. In some instances free gold was obtained by panning estimated to run as high as $3 per ton. Assays made at the instance of the plaintiff showed only traces of gold from samples taken from the various claims; assays made at the instance of the defendant showed gold in quantities, from a trace to $2.80 per ton. Practical miners testified on behalf of the defendant that they found upon the claims such veins as would justify a reasonably prudent miner and prospector in expending time and labor and money in their development; and mining engineers testified on behalf of the defendant that, from an examination of the ground by them, it was their opinion that a reasonably prudent man would be justified in expending time, money, and labor in exploiting and developing and prospecting the property. Mining engineers testifying for the plaintiff reached the opposite conclusion.

[3] Much argument has been devoted by counsel and many authorities cited with a view to determining the meaning which should be given to the words "discovery of the vein or lode" as used in section 2320, R. S.; the purpose being to establish the test by which to determine whether Webb was guilty of knowingly making false representations when he based his application for patent upon "discovery." We do not think an extended discussion of the authorities cited is necessary. They clearly indicate that the expression "discovery of the vein or lode" has no rigidly fixed meaning; and this, of necessity, owing to widely varying conditions to which the expression must be applied.

In Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113, the court, in speaking of the requisites of a valid location, said:

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"There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence."

In King v. Mining Co., 152 U. S. 222, 227, 14 Sup. Ct. 510, 511 (38 L. Ed. 419), the court, in speaking of section 2320, R. S., said it was—

"in effect, a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode."

In Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770, the court said:

"When the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. * * * But even in such a case * * * there must be such a discovery of minerals as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining."

Lindley on Mines, § 336, cites approvingly the definition of Judge Hawley contained in Book v. Justice Mining Co. (C. C.) 58 Fed. 106, 120:

"When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

It is unnecessary to decide what the exact necessary requirements for the issuance of the patent would have been as to discovery of minerals, if a contest had been instituted. The questions here are whether the representations actually made by the defendant were willfully and knowingly false, and whether those representations were relied upon by the plaintiff. A careful consideration of the whole evidence leads to the conclusion that plaintiff has failed to establish the allegations of the bill in respect to those matters. In view of plaintiff's contentions, set forth above, as to the meaning to be placed upon the statements in the application, it was incumbent upon plaintiff to prove that the statements made by Webb in the application were capable of but one meaning, viz. the meaning now placed upon them by plaintiff, or at least that this meaning was in fact intended by Webb, and that the statements were also understood with the same meaning by the officials of the General Land Office. Conceding, without deciding, that both of the above-stated requirements, contended for by plaintiff, as to mineral value of the land were necessary prerequisites to the issuance of a patent, and that such requirements had

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not been met, still the fraud alleged lacks proof. First, there is no evidence that the officials of the Land Office believed that such requirements were necessary, or that the language of the application was intended to make such representations. The register of the United States Land Office where the application for patent was made, who at the time of the application was receiver of the United States Land Office, testifying on behalf of the plaintiff, said:

"The Land Office arrives at the fact that the land is mineral land when the application is made from the mineral survey and the record of the application for patent. The Surveyor General of South Dakota certified it was mineral land before the Land Office passed upon this application for patent. He files this plat, and this plat is filed in connection with this application, certified by the Surveyor General on May 12, 1906."

And further said:

"I would say it is my opinion from the examination made of these papers for application for patent by the mineral clerk, by Mr. Bennett as register, and myself, that all the requirements of the United States statutes had been met by the applicant for this patent."

Mr. Bennett was not called as a witness.

Secondly, there is an affirmative showing by plaintiff that Webb, at the time of the application for a patent, did not believe that the requirements now contended for by plaintiff existed under the law and practice. If Webb did not believe that such requirements existed, then, clearly, plaintiff, by putting such a construction on the language of the application as would make Webb represent as actually existing a condition of affairs which he did not believe necessary to exist, and then by showing that such requirements had not in fact been fulfilled, has not furnished the required clear and convincing proof of the alleged willful fraud.

As to the alleged fraud touching the improvements, the evidence shows that the expenditures were made upon the Pyrites lode and mineral survey 1894 in accordance with the group theory; if this theory was applicable, there can be no doubt that the required amount was expended.

Upon the question whether the expenditures for improvements upon the Pyrites lode could be properly said to be for the benefit of mineral survey 1894, the evidence is conflicting; but the presumptive force of the certificate of the Surveyor General of South Dakota has not been destroyed, and this certificate, covering the matter as it does, must be taken as conclusive. United States v. Iron Silver Mining Co., 128 U. S. 673, 685, 9 Sup. Ct. 195, 32 L. Ed. 571; United States v. King, 83 Fed. 188, 27 C. C. A. 509.

It is the claim of the plaintiff that the alleged fraudulent scheme was devised and carried out with a view to securing the land within mineral survey No. 1894 for the sake of getting the timber thereon, which, it is alleged, was worth, standing $27,000. As tending to establish fraud, plaintiff calls attention to testimony that the presence of timber upon the land had been remarked upon by Webb and others connected with the Mining Company prior to the application for patent, and that Webb had instructed the man who dug the discovery

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holes to locate all the ground he could get in there, and also put in the timber, and to Webb's testimony that one purpose of locating these claims was to keep others from getting the ground next to the Pyrites lode. But such facts do not of themselves establish fraud. As was said in United States v. Iron Silver Mining Co., 128 U. S. 673, 684, 9 Sup. Ct. 195, 199 (32 L. Ed. 571), in reference to similar facts:

"A prudent miner, acting wisely in taking up a claim, whether for a placer mine or for a lode or vein, would not overlook such circumstances, and they may in fact control his action in making the location."

Furthermore, this timber was largely on the claims which had been located by parties not connected with the Mining Company and which had been afterwards purchased by it. Still further, the evidence shows that the expenditure of more than the amount stated as the value of the timber had been made upon or for the benefit of mineral survey 1894 prior to the application for the patent, and that subsequent to the application several times that amount was spent upon the Pyrites lode and mineral survey 1894 as a group. In the light of such evidence, the probability of the existence of the alleged fraudulent scheme for the purpose of obtaining the timber is reduced to a minimum. Certainly the evidence does not meet the required standard.

[4] It is finally claimed by the plaintiff that, though the evidence fails to establish fraud, yet it establishes a mistake on the part of the Interior Department in issuing the patent, and that for this reason the patent should be canceled. It is sufficient to say, as to this contention, that no such issue is presented by the bill of complaint, and that, when a suit of this character is based upon fraud, the plaintiff will be confined, as a general rule, strictly to that issue. Eyre v. Potter, 15 How. 42, 55, 14 L. Ed. 592; French v. Shoemaker, 14 Wall. 314, 335, 20 L. Ed. 852; Wall v. Parrot Silver & Copper Co., 244 U. S. 407, 37 Sup. Ct. 609, 61 L. Ed. 1229; Reed v. Munn, 148 Fed. 737, 80 C. C. A. 215.

As these conclusions dispose of the case, it is not thought necessary to determine other questions arising upon the record and discussed by counsel in their briefs.

Judgment affirmed.

CARLAND, Circuit Judge (dissenting). A consideration of the evidence in this case has satisfied me that the patent for M. S. 1894 should be canceled as against the Investment Company for fraud. The defendant Steiskal, who was the trustee for the bondholders under the mortgage executed by the Investment Company, now holds the title to the land in controversy as trustee. This appears, not only from the evidence, but by the terms of the deed on foreclosure. The complaint of the plaintiff being on file when the foreclosure proceedings were had, no additional rights accrued to the bondholders than those they possessed under the mortgage. The trustee as such cannot be an innocent purchaser of the land.

It appears in a general way that about $75,000 in bonds were issued by the Investment Company under the mortgage, but it does not appear

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by whom they are held, or the circumstances under which they were acquired. There is no allegation in the complaint that there are any innocent bondholders; the allegation in this behalf being confined to the trustee. We cannot, for want of allegation and proof, determine whether there are any innocent bondholders. The decree below should be reversed, and a decree entered canceling the patent to M. S. 1894 as against the Investment Company, but preserving the title of Steiskal as trustee in behalf of those bondholders who shall come in and by proper pleading and proof show themselves to be innocent bondholders for value under the mortgage. If no such bondholders shall come in, then the title of Steiskal as trustee shall be also canceled. If innocent bondholders do come in, sufficient land should be sold to satisfy their claims; all matters necessary to carry out our judgment being left to the trial court.

(258 Fed. 880)

NATIONAL BRAKE & ELECTRIC CO. v. CHRISTENSEN et al.*

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2163.

1. EQUITY ⟸422—FINAL DECREE.
A decree may be final both as to the merits and to the time relation; but, where a chancellor denies a petition for a rehearing, it may be the final judicial action in the case despite an earlier decree on the merits which otherwise was final, the final order bringing forward to the time thereof the original decree on the merits.

2. COURTS ⟸405(12)—FEDERAL COURTS—FINAL DECREE—"FINAL ORDER."
The federal procedure is wholly statutory, and, when the statute limited appeals to final decrees, the meaning of "final" becomes a matter of statutory construction, and it is within the province of the court to declare that a "final order" is one that ends the litigation in the trial court, and that the legislative intent was against piecemeal appeals.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Order.]

3. PATENTS ⟸323, 327—CONCLUSIVENESS—FINALITY OF DECREE.
Where an alleged infringer was permanently enjoined and an accounting was directed before a master in chancery for past infringement, and on appeal decree was affirmed, the decree, though interlocutory in form, was in its essence a final decree, so that after affirmance and before accounting was had the infringer cannot by petition set up in the Circuit Court of Appeals as res judicata a judgment of another Circuit Court of Appeals in an action brought by the same complainants in another circuit holding the patent invalid.

Application for Order Directing Dismissal of Bill Brought in the District Court of the United States for the Eastern District of Wisconsin.

Application by the National Brake & Electric Company for an order directing dismissal of a bill brought in the United States District Court by Niels A. Christensen and another against petitioner for patent infringement. Application denied.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Prohibition denied 250 U. S. —, 40 Sup. Ct. 54, 64 L. Ed. —.

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John S. Miller, Edward O. Brown, and Charles A. Brown, all of Chicago, Ill., and Thomas B. Kerr, of New York City, for petitioner.

Joseph B. Cotton, of New York City, Louis Quarles, of Milwaukee, Wis., and Wm. R. Rummler, of Chicago, Ill., for respondents.

Before BAKER, MACK, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Respondents sued petitioner in the District Court for the Eastern District of Wisconsin for alleged infringement of patent No. 635,280, issued October 17, 1899, to N. A. Christensen, for a combined pump and motor. On issues joined as to the ultimate rights of the parties, the District Court heard and considered all the evidence each side had to offer respecting the ownership, validity, and infringement of the patent, and thereupon adjudged and decreed that respondents were the owners of a valid patent which was being infringed by structures made, used, and sold by petitioner, that petitioner and its agents be enjoined during the life of the patent from making, using, or selling any combined pump and motor embodying the Christensen improvements, and that an accounting before a named master in chancery be had for past infringements. On appeal to this court that decree was affirmed in 1915. 229 Fed. 564, 144 C. C. A. 24. Ever since our mandate was issued, the cause has been pending in the District Court in Wisconsin on the accounting.

Sometime after the decisions in this circuit, respondents began a suit on the same patent against the Westinghouse Traction Brake Company in the District Court for the Western District of Pennsylvania. That litigation resulted in a decree, entered in 1917, pursuant to the mandate of the Circuit Court of Appeals for the Third Circuit (243 Fed. 901, 156 C. C. A. 413), holding the patent invalid and dismissing the bill for want of equity.

Thereupon petitioner went into the District Court in Wisconsin, and, on representations that it was entitled to the benefit of the Pennsylvania decree as a privy, asked that the Wisconsin decree be vacated and petitioner be granted leave to amend its answer on the merits by setting up the Pennsylvania decree as res adjudicata. That petition was denied.

And now petitioner comes before us in an original proceeding, asking that we recall our mandate, vacate our decree, find that the Pennsylvania decree is res adjudicata in this case, and thereupon direct the vacation of the Wisconsin decree and the dismissal of the bill on the merits.

On the records of the two cases, which are submitted as constituting all the evidence that bears on this motion, respondents dispute petitioner's contentions as to the identity of subject-matter and parties in the two decrees. But at the threshold lies the question of the nature and effect of the Wisconsin decree, affirmed by this court, and we have stated the case only in that aspect.

[1] A decree may be looked at from the point of view of time, and also from that of essence. The former discloses procedural law, mainly statutory appellate procedure; the latter concerns the right of a party who, for instance, on issues joined respecting title to property and exclusive possession or use, has submitted all his proofs

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and arguments, afterwards to require the court to ignore its deliberate decree on title and right of possession and to hear again the evidence and arguments on those issues because a supplemental or dependent issue has been reserved for future judicial determination.

If a decree writes "finis" to the litigation, it certainly merits the term "final" in time relation. But even in the time relation of procedure, the last judicial action is not always the matter that is reviewed on appeal. If a chancellor entertains a petition for a rehearing (motion for a new trial), his denial of the petition may be the final judicial action in the case, but his decree on the merits as deduced from the evidence and the law is the matter that is reviewed. The effect of the final order in time is to bring forward to the same time the order on the merits. Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251; Aspen Mining Co. v. Billings, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986; Kingman v. Western Mfg. Co., 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192; Chicago G. W. Rld. Co. v. Basham (March 3, 1919), 249 U. S. 164, 39 Sup. Ct. 213, 63 L. Ed. 534.

[2] Federal appellate procedure is wholly statutory. When the statute limited appeals to "final" decrees, the meaning of "final" was a matter of statutory construction. It was within the province of the court to declare that a "final" order was only the one that ends the litigation in the trial court and that the legislative intent was against "piecemeal" appeals. Barnard v. Gibson, 7 How. 650, 12 L. Ed. 857; Craighead v. Wilson, 18 How. 199, 15 L. Ed. 332; Beebe v. Russell, 19 How. 283, 15 L. Ed. 668; Humiston v. Stainthorp, 2 Wall. 106, 17 L. Ed. 905; Green v. Fisk, 103 U. S. 518, 26 L. Ed. 485; Keystone Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32, 33 L. Ed. 275; McGourkey v. Toledo Ry. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079; Ex parte National Enameling Co., 201 U. S. 156, 26 Sup. Ct. 404, 50 L. Ed. 707; Heike v. United States, 217 U. S. 423, 30 Sup. Ct. 539, 54 L. Ed. 821; Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629. In many of these cases the point was stressed that the intermediate order or decree sought to be presented for review, regardless of its essence, was not final for the purposes of appeal within the meaning of the statute. In the Heike Case the court observed:

"It is true that in a certain sense an order concerning a controlling question of law made in a case is, as to that question, final. Many interlocutory * * * orders effectually dispose of some matters in controversy, but that is not the test of finality for the purposes of appeal or writ of error."

If an order that is interlocutory in time effectually disposes of certain issues under the law and the evidence, the effect of the last order that disposes of the remaining issues is the same as the effect of the order denying a motion for a rehearing—it brings forward to the latter date for the purposes of appeal the intermediate order on the merits, unless there is a special statutory provision for an intermediate appeal from the intermediate order in question.

[3] Even in cases of procedural law, where the only question was when the time for taking an appeal was ripe, the manifest inconveniences and hardships from long postponement of a review of a decree,

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intermediate in time, but based on a full submission and consideration of the law and the evidence respecting the foundational issues of title and use, led to exceptions in the application of the time rule. In Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404, an assignee in bankruptcy filed a bill to cancel sundry deeds of the bankrupt, to establish the assignee's title and right of possession, and to obtain an accounting of the rents and profits received by the defendants. On a full hearing of the issues of title and right of possession, and of the fact that defendants had been in unlawful possession, the trial court decreed that the complainant was the owner and was entitled at once to exclude the defendants from the property, that the defendants' receipts of rents and profits were unlawful, that the amount thereof be determined in an accounting before a master, and that so much of the bill as related to the accounting be retained for further decree. Plainly the parties were kept in court for determination of an issue within the pleadings. Plainly the decree on title and right of possession was not the "final" decree in time relation. Plainly, in its essence, that decree was final as to the issues then adjudged, for they "could not have been afterwards reconsidered or modified except upon a petition for a rehearing"; and the only question was whether an appeal should then be allowed or only after all issues had been finally disposed of in the trial court. In view of the fact that the assignee in bankruptcy might distribute the proceeds of the sale of the property among the creditors before the accounting issue for rents and profits was finally disposed of, the appeal was permitted to stand. In aid of the "no piecemeal appeals" rule, Mr. Chief Justice Taney condemned the splitting of cases and the rendition of two or more final decrees on the merits and pointed out to the trial courts that after a full hearing of the foundational rights of the parties only an opinion should be given and no executable orders entered until the master's account of profits or damages was in, so that all matters in dispute might be embodied in "one final decree." (But the reasons that underlay that attitude have lost their importance by changes in appellate proceduure introduced in the act creating the Circuit Courts of Appeals.) Thomson v. Dean, 7 Wall. 342, 19 L. Ed. 94, was a similar case. There also the decree on review finally adjudged title and right of possession, and reserved the matter of accounting for a future decree.

While Forgay v. Conrad and Thomson v. Dean are exceptional cases in the application of the Federal appeals statute then in force, they are not exceptional when substantive law is the test. Indeed, throughout the world of English-derived jurisprudence, there is unanimity that a decree which, on issues joined, and on submission by the parties and consideration by the court of all the evidence the parties can or choose to adduce and all the law the parties and the court deem applicable, adjudges that the complainant is the owner and entitled to the exclusive possession of property and that the defendant has unlawfully invaded the complainant's rights, and orders the defendant to surrender or keep away from the property forever, is a final decree on those issues, even though the issue concerning profits or damages from the defendant's trespasses has been reserved for future judicial action.

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Decrees of this character have been held to be final in essence, regardless of time relation, in cases of partition, partnership, foreclosure, redemption, cancellation, rescission, injunction, condemnation, and many others.[1] English courts have never been tied by a statute limiting appeals to those that write "finis" to the litigation. In an English chancery cause there may be successive appeals. Consequently the essential nature of the decree or order has furnished the test.[2] And in its simplest form the test is whether the parties have intended to submit and have submitted an issue of title or right upon all their admissible contentions of fact and law and the court has intended to decide and has decided that issue and has put its decision into an immediately executable decree which in terms puts an end to that controversy, with no reservation of right to the parties or to the court for further or renewed

[1] Partition cases: Allison v. Drake, 145 Ill. 500, 32 N. E. 537; Ames v. Ames, 148 Ill. 321, 36 N. E. 110; Williams v. Wells, 62 Iowa, 740, 16 N. W. 513; Damouth v. Klock, 28 Mich. 163; McRoberts v. Lockwood, 49 Ohio St. 374, 34 N. E. 734; Lochrane v. Loan & Security Co., 122 Ga. 433, 50 S. E. 372; Cedar Co. v. Peoples Bank, 111 Fed. 446, 49 C. C. A. 422 (4th C. C. A.); Richmond v. Richmond, 62 W. Va. 206, 57 S. E. 736.

Partnership Cases: Decatur Land Co. v. Cook (Ala.) 27 South. 559; Sammis v. Poole, 89 Ill. App. 118, affirmed in 188 Ill. 396, 58 N. E. 934; Hastie v. Aiken, 67 Ala. 313; Hake v. Coach, 105 Mich. 425, 63 N. W. 306.

Foreclosure and redemption cases: Myers v. Manny, 63 Ill. 211; Gentry v. Lawley, 142 Ala. 333, 37 South. 829; Marquam v. Ross, 47 Or. 374, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1; Mills v. Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271; Zimmerman v. Pugh (Ala.) 39 South. 989.

Cancellation or reformation of deed cases: McMurray v. Day, 70 Iowa, 671, 28 N. W. 476; Lohman v. Cox, 9 N. M. 503, 56 Pac. 286; Stahl v. Stahl, 220 Ill. 188, 77 N. E. 67; Jones v. Wilson, 54 Ala. 50; Johnson v. Northern Trust Co., 265 Ill. 263, 106 N. E. 814.

Perpetual injunction cases: Merch & Manuf'rs National Bank v. Kent, 43 Mich. 292, 5 N. W. 627; Sacramento Irr. Co. v. Lee, 15 N. M. 567, 113 Pac. 834; Improvement Co. v. Lund, 15 N. M. 696, 113 Pac. 840; Chicago Life Ins. Co. v. Auditor, 100 Ill. 478; Earl v. Jacobs, 177 Mich. 163, 142 N. W. 1079.

Condemnation cases: Petition of Philadelphia, M. & S. St. Ry. Co., 208 Pa. 354, 53 Atl. 191; Tennessee Cent. Ry. Co. v. Campbell, 109 Tenn. 640, 75 S. W. 1012.

Miscellaneous cases: Walker v. Crawford, 70 Ala. 567; People v. Bank, 133 Cal. 107, 65 Pac. 124; Wynn v. Bank, 168 Ala. 469, 53 South. 228; Robert v. Rousseau, 28 R. I. 335, 67 Atl. 330; Klein v. Independent Brewing Ass'n, 231 Ill. 594, 83 N. E. 434; Townsend v. Petersen, 12 Colo. 491, 21 Pac. 619; Fry v. Rush, 63 Kan. 429, 65 Pac. 701; Perrin v. Leper, 72 Mich. 454, 40 N. W. 859; Ayer v. Termatt, 8 Minn. 96 (Gil. 71); De Grasse v. Gossard Co., 236 Ill. 73, 86 N. E. 176; Arnold v. Sinclair, 11 Mont. 556, 29 Pac. 340, 28 Am. St. Rep. 489; Rawley v. Burris (Tenn. Ch.) 47 S. W. 176; France v. Bell, 52 Neb. 57, 71 N. W. 984; Marean v. Stanley, 34 Colo. 91, 81 Pac. 759; Neher v. Crawford, 10 N. M. 725, 65 Pac. 156; Canal Co. v. State of Louisiana, 233 U. S. 362, 34 Sup. Ct. 627, 58 L. Ed. 1001.

[2] British and colonial cases: In re Stockton Iron Furnace Co., 10 L. R. Ch. D. 335; Vidi v. Smith, 3 El. & Bl. 968; Fenner v. Wilson, 62 L. J. Ch. 984; North British Bank v. Collins, 1 MacQueen (Scotch Appeal Cases) 369; Shaw v. St. Louis, 8 Supreme Court of Canada, 385; Baptist v. Baptist, 21 Supreme Court of Canada, 425; Ahmed Musaji Saleji v. Hashim Ebrahim Saleji, Indian Law Reports, 29 Calcutta, 758; Bhup Indur Bahadur Singh v. Bajai Bahadur Singh, Indian Law Reports, 23 Allahabad, 156; Boloram Dey v. Ram Chundra Dey, Indian Law Reports, 23 Calcutta, 279; Carles v. Hertz' Trustee, 1904 Transvaal Supreme Court, 584.

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presentation and consideration. Such a decree, after the term, can be opened only on petition for rehearing, bill of review, or appeal.

From the point of view of time any order is interlocutory that "speaks between" the beginning and the end of the litigation. But from the point of view of essence only those orders are interlocutory which abstain from determining the merits of any foundational issue of title or right and do no more than control temporarily the possession or use of property or the actions of the parties in order that the decree or decrees on the merits when rendered may be effectively executed.

Injunction cases (and there can be in reason no difference between the equitable protection of patent rights and other rights) furnish a particularly clear example of the essential distinction. An owner of property is harassed by repeated and continuing trespasses. He may bring a common-law action for damages on account of the trespasses. But that is not an adequate remedy against a persistent trespasser. So the owner invokes the equitable remedy of injunction devised by the old-time chancellors. In his bill he sets forth his title and right to exclusive possession and the defendant's repeated and continuing trespasses as indicative of the defendant's intent to trespass in the future, and thereupon prays, always for a permanent injunction, and sometimes for a temporary. If on affidavits and other informal and inconclusive evidence the chancellor orders the defendant to refrain until he can determine the equities on a full and formal submission and deliberate consideration of all the evidence and law, the order is not only interlocutory in time but also in essence. But when the parties have submitted everything they have respecting title and right to exclusive possession and the defendant's minatory attitude, and thereupon the chancellor enters a permanent injunction, immediately executable, the order is final in essence on the issues submitted and determined, but may be either final or interlocutory in time relation. It is final in time, if the owner asks no damages for past trespasses, or, having asked waives them. In McGourkey v. Toledo & Ohio Ry. Co., 146 U. S. 536, 546, 13 Sup. Ct. 170, 172 (36 L. Ed. 1079), it was said that a decree fixing the rights and liabilities of the parties and ordering an accounting before a master is final in time relation, that is, for the purposes of appeal, "if such accounting be not asked for in the bill." It is interlocutory in time if the owner sets up and demands his damages for past trespasses and the chancellor reserves that matter for future judicial action. But how comes the chancellor to act at all upon the matter of damages? Injunction, which is the sole basis of the equitable jurisdiction over the bill, is prospective—it regulates the conduct of the defendant for the future. Damages concern only the past. For them a common-law action was proper and adequate. But the chancellor, having rightly taken cognizance of an equitable subject-matter, rightly concludes, in order that there may be a speedy determination of both the equitable and the legal causes of action concerning the same property, not to remit the parties to the common law court, but to entertain the common-law cause of action as an appendage of the equitable cause. When the chancellor has found the complainant's title and right to ex-

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clusive possession and from evidence of the defendant's repeated and continuing trespasses has found the defendant's threat as to the future, his entry of a permanent injunction exhausts every equitable issue in the bill. But the same evidence that discloses the defendant's threat as to the future usually proves the existence of damages for past trespasses. All that remains in such a case is to ascertain one element, the amount, in order to make the common-law cause of action complete. And it is more convenient that this should be done in the court that already has jurisdiction of the parties and has established from the evidence the foundation of the common-law cause of action. So the decree of a permanent injunction, determining as it does all the equities of the bill, is final as to the equities, irrespective of whether an accounting of damages for past trespasses is or is not reserved for future action.

With respect to time relation the distinction between a temporary and a perpetual injunction may be ignored without injury to the parties. If a decree that holds or creates a status until a full hearing can be had is challenged, the appeal must be taken within thirty days. Such a decree is interlocutory both in time and in essence. If a decree dismisses an injunctional bill for want of equity, a period of six months is allowed for appeal. Such a decree is final both in time and in essence. If a decree establishes a perpetual injunction and orders an accounting, no injury is done if, as a matter of procedural law, it be held that an appeal must be taken within thirty days. Such a decree, though final in essence, is interlocutory in time, and stressing time in procedure, it may be better that the decree be classified as interlocutory for the purposes of appeal. But although appeals from decrees of temporary injunction and from decrees of perpetual injunction with accounting reserved are thus brought within the same section of the appellate practice statute, no bar to recognizing the difference in essence between temporary and perpetual injunctions is thereby formed. On appeal from a decree of temporary injunction, the only question is whether the trial court abused its discretion in holding or creating a status. If a decree of perpetual injunction with accounting reserved must be held to be interlocutory in essence because it is held to be interlocutory in time, then the only question on appeal would be the chancellor's abuse of discretion. This very contention was presented in Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810, and was rejected.

If a decree of perpetual injunction with accounting reserved is merely interlocutory in essence, then the defendant as a matter of right can insist that the chancellor hear again the same evidence and newly discovered evidence and decide anew the equities of the bill. If such a decree is affirmed on appeal, its character, if interlocutory in essence, is not thereby changed, and the defendant could still insist on having his day in the trial court on the merits. In reply to such an insistence in In re Potts, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994, the court said:

"The decision and decree of this court did not amount, indeed, technically speaking, to a final judgment, because the matter of accounting remained to be disposed of. * * * But they constituted an adjudication by this court of

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all questions, whether of law or of fact, involved in the conclusion that the letters patent of the plaintiff were valid and had been infringed. * * * The questions of novelty and infringement were before this court, and disposed of by its decree, and must therefore be deemed to have been finally settled, and could not afterwards be reconsidered by the circuit court."

And the defendant, of course, could not have the Supreme Court reconsider its final decree on validity and infringement except by petition for rehearing. Inasmuch as the act creating the Circuit Courts of Appeals (Act March 3, 1891, c. 517, 26 Stat. 826) requires those courts to hear and determine patent cases in the way theretofore done by the Supreme Court, we had assumed that our books were closed on the questions of the validity and infringement of the Christensen patent ever since 1915.

Lovell-McConnell Co. v. Auto Supply Co., 235 U. S. 383, 35 Sup. Ct. 132, 59 L. Ed. 282, involved a matter of taxable costs in a Circuit Court of Appeals. The fees in question were not taxable if the decree appealed from was a "final decree." It was held that a decree finding a patent valid and infringed, awarding a permanent injunction, and directing an accounting of damages and profits was a final decree for the purpose of determining the rights of the parties concerning costs. If a decree that is held to be interlocutory for the purpose of appeal is held to be final respecting a right to costs, how much more important it is that such a decree be held to be final respecting the right to hold a permanent injunction based on findings of validity and infringement after a full submission and consideration of all the evidence and the law bearing on those issues.

In Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629, the statute governing the issuance of writs of certiorari by the Supreme Court to Circuit Courts of Appeals was interpreted and applied. It was held that a refusal to grant the writ on application to review a decree of perpetual injunction with accounting reserved was not equivalent to an affirmance of that decree by the Supreme Court; and that, a writ of certiorari having been granted after the Circuit Court of Appeals had passed on the accounting, the whole case was before the Supreme Court for review. This procedural decision is not deemed by us to oppose a holding that a decree of perpetual injunction with accounting reserved is a final decree on the equities unless vacated on appeal or writ of certiorari.

Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 Sup. Ct. 506, 61 L. Ed. 1148, is relied on by petitioner as demonstrating that the decree here in question is merely interlocutory in essence. In that case a bill for infringement was dismissed for want of equity by a District Court in Ohio, and that decree had been affirmed by the Circuit Court of Appeals for the Sixth Circuit (213 Fed. 789, 130 C. C. A. 447). Contemporaneously a bill by the same complainant against different defendants was pending in a District Court in Illinois, and that bill was dismissed for want of equity (193 Fed. 418). When the appeal from that decree came before this court, the defendants-appellees moved that the decree of the District Court be affirmed on the ground that they were in privity with the defendant in the Ohio

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case (222 Fed. 261, 138 C. C. A. 23). The Supreme Court held that the issue of the defendants-appellees' having been privies to the decree of the District Court in Ohio was pleadable and the question of fact triable in this appellate court. The decrees of the two District Courts and the decree of the Circuit Court of Appeals for the Sixth Circuit were all final decrees both in time and in essence. No question arose or could arise whether a decree of perpetual injunction, immediately executable, though interlocutory in time by reason of a reserved accounting, is or is not final in essence on the issues of title and right of exclusive use. Our understanding of the Hart case is that the first adjudication on the equities of a bill is binding on the parties and their privies. In what ways that first adjudication may be availed of are matters of procedure. We do not understand that the intention of the parties in submitting their full proofs and the character of such submission, and the intention of the court in giving deliberate consideration to all the evidence and law the parties can present and the character of the result of such consideration, are dependent upon the subsequent condition that the court shall always deny and never grant the equitable relief prayed for in the bill.

We are unable to find, as a matter of substantive law, that a perpetual injunction has only a temporary purpose and force.

The petition is denied.

(258 Fed. 888)

MOREY LINOTYPING CO. OF CHICAGO, ILL., v. CHICAGO LINO-TABLER CO. OF CHICAGO, ILL.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2660.

APPEAL AND ERROR ⟸339(4)—INTERLOCUTORY DECREE—TIME FOR APPEAL. While a decree in a suit for patent infringement, solely enjoining the infringement and ordering an accounting, is a final decree in essence as to the equities of the bill, yet, as a matter of procedure, it is an interlocutory decree within the time for perfecting an appeal, and so, where an appeal was not perfected within 30 days, it must be dismissed.

Appeal to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Chicago Lino-Tabler Company of Chicago, Ill., against the Morey Linotyping Company of Chicago, Ill. From a decree for complainant, defendant appeals. Appeal dismissed.

A. L. Jackson, for appellant.

Charles A. Brown, of Chicago, Ill., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Appellee sued appellant on account of alleged infringement of a patent and prayed for a permanent injunction and an order of accounting. On issues joined respecting the validity of the patent and the fact of infringement, the District Court heard all that the parties had to offer and found that the patent was

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valid and infringed, entered a permanent injunction, immediately executable, and ordered an accounting of damages and profits to be had before a master in chancery.

Forty-one days later appellant filed in the District Court its petition for an appeal, which was at once allowed. And now appellee moves that the appeal be dismissed for want of jurisdiction on the ground that the appeal should have been taken within thirty days from the entry of the decree.

We have no doubt that the decree of permanent injunction, with accounting reserved, is a final decree in essence as to the equities of the bill. See National Brake & Electric Co. v. Christensen, 258 Fed. 880, 169 C. C. A. 600, herewith decided. But, as therein pointed out, a plain distinction exists between substantive and procedural law. And under the authorities referred to in that case the decree is interlocutory in time, and time relation is determinative of the procedure.

The appeal is dismissed.

(258 Fed. 889)

PLUNKETT et al. v. LEVENGSTON.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2463.

1. TRIAL ⟸211—INSTRUCTIONS—INFERENCES—FAILURE OF PARTY TO TESTIFY.
In a civil action the jury may properly be instructed that it is justified in drawing inferences against defendants because of their failure to testify, and especially where facts in issue are peculiarly within their knowledge.

2. RELEASE ⟸59—INSTRUCTIONS—EFFECT OF COVENANT NOT TO SUE.
An instruction as to the validity and effect of a covenant not to sue, executed by plaintiff to certain defendants, *held* erroneous.

3. PLEADING ⟸409(1)—DEFECTS IN PLEA—WAIVER.
Whether a covenant not to sue, running to two of the three tort-feasors, can be pleaded as a defense by the two in an action against the three, not determined, because plaintiff sought a determination in this one action of all issues.

4. FRAUD ⟸8—FRAUDULENT REPRESENTATIONS—GROUNDS OF LIABILITY.
Liability for damages in an action for fraud is not created solely by the presence of a fraudulent intent, but there must have been false representations made with intent to deceive, and they must have been material, made to induce action, and relied upon and acted upon to the injury of the party claiming damages.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by Harry M. Levengston against James Plunkett and William Young Conn Humes. Judgment for plaintiff, and defendants bring error. Reversed.

Defendant in error, herein called "plaintiff," was persuaded by plaintiffs in error, herein called "defendants," to purchase a collection of books called a "historical library," for the sum of $65,000. This action is brought to recover damages by reason of fraud alleged to have been practiced by defendants in making the sale.

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Plunkett, one of the defendants, met plaintiff in New York state and persuaded him to go to New Orleans where the library was located, the same having been collected by a librarian named Beer. Upon arriving at New Orleans, plaintiff met Humes, who, it was represented, held an option to purchase the books and therefore controlled the sale. Although traveling many miles to personally examine the collection, plaintiff never saw the library; but upon representations made, now in this action asserted to be false and which induced him to buy, plaintiff purchased the library for $65,000.

Plunkett represented that he was to receive 5 per cent. commission for making the sale, but proposed to apply this commission upon the purchase price, provided plaintiff gave him the right to resell the library and share equally in the profits of the resale. The agreed price less the 5 per cent. was thereupon paid by plaintiff and the books were sent to New York.

There is evidence tending to show that the entire library was not worth more than a thousand dollars, and it also appeared that only about $15,000 of the purchase price went to Mr. Beer; the balance being divided among the defendants.

After the sale was made, Plunkett represented that he had prospective buyers from one of whom only a definite offer was submitted. This buyer, it was claimed, would give $150,000 for the library, but payment was to be made by unsecured notes. As a part of the deal, plaintiff was to pay Plunkett a commission of $50,000 cash. Inquiry as to the responsibility of the party who was to execute the $150,000 notes materialized an unnamed woman whose exact residence was unknown.

When the books reached New York City, steps were taken to catalogue them. During this period, while plaintiff was still ignorant of the nature or value of his collection, Humes advised him that a fraud had been committed and proposed to disclose certain information upon condition that plaintiff would agree not to sue Humes or Tomlinson. Thereupon plaintiff executed to Humes and Tomlinson the desired agreement. All defendants rely upon this agreement as a bar to plaintiff's recovery. It reads as follows:

"It is hereby agreed that no action shall be begun against William Y. C. Humes and Herbert O. Tomlinson, or either of them, by reason of any matters existing at this date by the undersigned.

"Given for a good consideration.

"Saratoga Springs, N. Y., January 21, 1911. H. M. Levengston.

"Witness: W. T. Butler."

The jury rendered a verdict in plaintiff's favor for $73,423.12, which sum included interest from the date of the transaction to the day of the rendition of the verdict. Thereafter, upon order of the court, this sum was reduced to $65,000 and judgment entered therefor against defendants. Tomlinson has not attacked the judgment in this court, having sought immunity through a discharge in bankruptcy. Defendants assign error:

(a) In not directing a verdict for defendants.

(b) In receiving evidence against objection.

(c) In instructions to the jury.

Donald De Wolfe and Vincent G. Gallagher, both of Chicago, Ill., for plaintiffs in error.

Clifford L. Beare, for defendant in error.

Before EVANS, Circuit Judge, and GEIGER, District Judge.

EVANS, Circuit Judge (after stating the facts as above). We are convinced that the evidence is sufficient to support the verdict rendered in favor of the plaintiff. It will serve no useful purpose to restate in detail all of the evidence upon which we base this conclusion.

Defendants' claim that the representations set forth in the declaration were not actionable—that at least some of them were mere expressions of opinion, while others were promises or statements of proph-

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ecy as to future transactions—must also be rejected. While some of these statements, standing alone, were subject to this criticism, there were many actionable representations made. They were made at various times and at different places and by different defendants. It is impossible to set them forth fully. They should be read together. So construed, we are convinced that actionable misrepresentations appear.

[1] *Instructions.*—Complaint is made because the court, among other things, charged the jury as follows:

"You may also take into consideration the fact that it was agreed by the parties here that at least fourteen cases of these books were shipped from the Chicago wareroqms of Tomlinson & Co. to New Orleans at or about the time when the transaction took place, and you also had a right to take into consideration the fact that Tomlinson has not seen fit to take the stand in this case. All of those facts may be considered by you. The same is true with the defendants Plunkett and Humes. Those charges were made, and they probably knew as well as anybody in the world actually what took place, and they had a perfect right to take the stand in their own behalf, and give you their version of the transaction, and I say you may take into consideration the fact in reaching your verdict that they did not so testify, although as you know that at different times during the trial appeared here. * * *"

In giving this charge no error was committed. This was a civil action. The jury was justified in drawing inferences against defendants because of their failure to testify. Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463; Union Bank v. Stone, 50 Me. 595, 79 Am. Dec. 631; Brown v. Schock, 77 Pa. 471; Bastrop State Bank v. Levy, 106 La. 586, 31 South. 164.

More than this, one of the issues of fact arose over defendants' claim that a librarian of standing had collected these books. On the other hand, it was claimed by plaintiff that a large portion of the library was shipped from Chicago to New Orleans shortly before the prospective purchaser arrived; that these books were sent by Tomlinson & Co. to New Orleans; that they were no part of the library collected by Mr. Beer. The real facts were peculiarly within the knowledge of defendants, particularly Tomlinson, and under such circumstances the failure of a party to testify raises an inference against him. Mantonya v. Reilly, 184 Ill. 183, 56 N. E. 425. We conclude, however, that, in the absence of any special circumstances such as here disclosed, the instruction was proper. Wigmore on Evid. § 289.

The agreement heretofore quoted was pleaded as a bar by all defendants. To this plea, plaintiff filed a replication of non est factum. Upon the trial the execution and delivery of the agreement was clearly established, and to avoid its effect plaintiff introduced evidence tending to show that its execution was secured by fraud, also that it was a conditional release, and further that there was a total failure of consideration for its execution. Against objection the court received this evidence on the assumption that the pleadings were "as broad as the proof." Formal amended pleadings were later filed.

[2] The judge charged the jury in reference to the agreement as follows:

"Now as to the so-called covenant not to sue, you have heard evidence given by Levengston, you have heard Mr. De Lay, you have heard Mr. Butler,

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and there have been certain letters read to you which refer to it. Now, if you find from the evidence in this case that Levengston sent that paper or release to Tomlinson and Humes on the basis of a promise on the part of Humes that he would furnish certain evidence of the fraud committed on Levengston, and that he would send an affidavit which would enable Levengston to institute his suit in New York City, and if you find further from the evidence that Humes did not fulfill his part of the agreement; if he made his promise and failed to keep it—then the covenant, so-called covenant, not to sue is no bar to the action in this case.

"But you have all the facts before you. You have all the facts that anybody has. You heard all the evidence. It must be fresh in your mind because it was the last evidence given, and you are to make up your minds from that evidence whether Humes did what he promised to do when he got the covenant not to sue from Levengston. If he did fulfill his promise, if Levengston got what he expected to get and what he was promised, then there is a complete bar as to Tomlinson and Humes. If, on the other hand, this document was procured by false promises, if it was procured by promises that were not fulfilled, then it is no bar to an action on the part of Levengston."

Defendants challenged the correctness of this charge and preserved their rights by exceptions.

This charge was clearly erroneous. There was no total failure of consideration for executing the agreement. In fact, the jury could have well found that a part of the consideration passed to the plaintiff before the agreement was executed.

Nor can we accept as correct the statement that—

"If he did fulfill his promise, if Levengson got what he expected to get and what he was promised, then there is a complete bar as to Tomlinson and Humes. If, on the other hand, this document was procured by false pretenses, if it was procured by promises that were not fulfilled, then it is no bar to an action on the part of Levengston."

If the agreement was obtained through fraud, and we think the evidence presents a jury question on this issue, it was not a bar to plaintiff's recovery. But such issue of fraud was not fully nor correctly presented to the jury by these instructions.

[3] Whether defendant could, against plaintiff's objection, have pleaded a covenant not to sue, running to two of the three or more joint tort-feasors in an action against all wrongdoers, we need not determine. See Duck v. Mayeu, 2 L. R. Q. B. D. 1892, 511; Mason v. Jouett, 2 Dana (Ky.) 107; C. & A. Ry. v. Averill, 224 Ill. 516, 79 N. E. 654; McDonald v. Goddard Grocery Co., 184 Mo. App. 432. 171 S. W. 650, 58 L. R. A. 293 (note); 34 Cyc. 1090; 23 Ruling Case Law, 405, note 13. While we are convinced that this agreement is a covenant not to sue (City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271), and not a release, the record before us is not such as would justify us in disposing of the case upon a question of pleading.

The plaintiff sought a determination of the issues raised by the covenant by him executed and invited the court to dispose of all of the issues presented by the pleadings and is not now in this court in a position to avail himself of a rule of pleading which at best is somewhat out of harmony with a practice which demands disposition in one action of all issues capable of being fairly triable in one suit. Neither in the District Court nor in this court did plaintiff raise any

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objection to the disposition of all the issues arising out of the execution and delivery of this covenant.

[4] Another assignment of error respecting instructions, we think, is well taken.

At the completion of the charge counsel for defendant called the court's attention to an alleged failure to enlighten the jury respecting "future promises." To this, the court replied:

"Well, I am of the opinion, as I stated on the motion for a directed verdict, that, if the jury finds in this case that there was a deliberate planned fraud, then it is immaterial what means were used to induce Levengston to give up his money; whether it was a promise in the future, whether it was an expression of opinion, whether it was saying the boxes were open, look at the books. It doesn't make the slightest difference what the conspirators did to bring about the desired result, if they intended to commit a fraud, and if they unlawfully intended to induce the plaintiff to part with the money."

To this charge defendant excepted.

This instruction was clearly erroneous. Liability for damages in a fraud action is not created solely by the presence of a fraudulent intent. There must, of course, have been false representations made with intent to deceive, and such representations must have been material, made to induce action, relied upon, and acted upon to the injury of the party claiming damages.

While it is true the judge had previously defined the elements necessary to make out a case of fraud accurately, this later incorrect statement of the law could not but mislead the jury to defendants' prejudice.

The judgment is reversed.

(258 Fed. 893)

NIAGARA TRANSIT CO. v. NORTHWESTERN FUEL CO.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1919.)

No. 2612.

WHARVES ⟸20(1)—COLLAPSE OF COAL UNLOADING BRIDGE—ACT OF GOD.

The collapse during a storm of a steel unloading bridge on respondent's coal dock weighing 1,200 tons, new and of approved and modern construction, by which libelant's vessel was injured, *held* not due to negligence which rendered respondent liable, but to the entirely unusual violence of the storm which could not reasonably have been anticipated.

Appeal from the District Court of the United States for the Western District of Wisconsin.

Suit by the Niagara Transit Company against the Northwestern Fuel Company. Decree for respondent, and libelant appeals. Affirmed.

Fred W. Ely and John B. Richards, both of Buffalo, N. Y., for appellant.

L. K. Luse, of Superior, Wis., for appellee.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge. The action was in admiralty for damages to appellant's boat William A. Rogers through the collapsing

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of appellee's coal unloading bridge at its Superior, Wis., dock where the boat was moored for unloading. The bridge was a steel structure, having a trussed span of over 500 feet, weighing about 1,200 tons, its lower chords 80 feet from the surface, and the truss about 40 feet high. It was supported on huge steel legs, one set (called the shear legs) near the water end of the dock, and another (called the pier legs) at the opposite end; the span extending normally at about right angles to the water line. The legs rested firmly on massive compound trucks, each having twelve flanged wheels which ran on heavy rails laid on the dock parallel to the water line, the rails for each set of trucks being about 2 feet apart. Electrically driven devices operated the six driving wheels of each truck whereby the bridge could be moved either way along the rails so that boats might be unloaded at any point along this thousand or more feet of dock front served by this bridge, and the coal deposited anywhere upon the dock under the bridge.

At the shear end of the span there was a raisable arm or apron nearly 80 feet long, which, when in position for unloading boats, was extended forward on the plane of the lower chords of the span making of it a continuation of the bridge, held in position over the boat by heavy cables from the upper part of the span. This apron or extension was so attached to the lower part of the span that when desired it could be raised by the cables, and when at its full height it stood about ten degrees forward from a position rectangular to the floor of the span, and held in place by the cables. Along the underside of the span and of the extended apron there was a trolley arrangement whereby a small suspended trolley house could be moved underneath and along the entire span and apron of the structure. From it, suspended by heavy cables, was the bucket or "clam" for unloading the boats. This was in two parts, weighing empty 14 tons, and of 10 tons capacity.

The boat to be unloaded was made fast to the dock and the trolley and clam were then run out on the apron over an open hatch of the boat. The open clam was lowered into the hatch and being raised gathered and held its capacity of coal, and was run back on the bridge and dumped at the place desired. As the various hatches were emptied, others were reached by moving the bridge or the boat or both. To load, dump, and return the bucket required about a minute.

A single operator in the trolley house controlled the movement of the bridge along the rails as well as the movements of the bucket, and the raising and lowering of the apron when this was required. Hand and foot levers operated the necessary electrical machinery. For the very essential function of holding the bridge at any desired place on the rails there were brakes and rail clamps. The brakes engaged the driving wheels, and were set automatically when the driving power was off the wheels, and after the brakes were set the automatic descent of a very heavy weight caused strong heavy clamps to engage the rails. Thus each time the operator threw off the power that moved the bridge along the rails, the holding mechanism became automatically effective.

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In addition to these automatic holding devices, appellee had procured and had placed for convenient access on the trucks certain devices for additional security in case of emergency, consisting of chock blocks with bolts, designed to be firmly bolted to the tracks so that when in place they would rest upon the rails and against the forward wheels; the blocks being curved to engage the wheels almost to the point of their contact with the rails.

In building the structure provision was made for some skew movement whereby the shear legs might move some distance, about 70 feet, either way from rectangular position, without endangering the bridge.

On the day in question, while the boat was being unloaded, a storm of great violence came on, forcing the shear end of the bridge to move along the rails so far as to collapse it, and the extension or apron, which with the clam, was over the boat, fell upon it, causing the damage for which the recovery is sought.

Appellee contends that the storm which caused the movement and the collapse of the bridge was one of unprecendented violence, and that for the damage occasioned by this "act of God," unmixed with any negligence on its part, it cannot be held liable. Appellant maintains that the violence of the storm was not unprecedented at this place; also, that appellee did not exercise proper care to secure the structure to the rails, and that it was not properly secured, and that this fact, coupled with the negligent operation of the bridge and bucket in the face of the impending storm, was the proximate cause of the collapse.

The evidence was voluminous, orally given before the district court, which found for appellee, acquitting it of any negligence in the construction and operation of the bridge, finding that the injury complained of was caused wholly by "an act of God," through this storm which it found to have been unprecedented in its violence.

The questions are purely of fact, and the evidence consists wholly of the transcript of that which was adduced in the district court. That appellee exercised all due care in the selection and erection of the bridge is very evident. The structure was new, having been in use only about six months. It was built on the then most approved plan by constructors presumably of the highest skill, and the evidence affords no ground for any charge of negligence in this regard.

As to the appliances for holding the bridge to the rails the evidence in our judgment warrants the conclusion of their sufficiency for all contingencies which might in reason have been anticipated. That the brakes were set and the clamps were in proper engagement is sufficiently shown by evidence of the physical condition of the parts after the occurrence. But in addition to these, with warning of an approaching windstorm the chock blocks were bolted to their intended places on the rails. But all these together were not sufficient to stop the movement of the shear end of the bridge.

The fact of the movement against the combined holding power of these appliances, far from sustaining the contention of negligence through alleged failure to afford sufficient anchorage, in our opinion

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gives but added proof of the extreme violence of the storm, which is after all the factor most determinative of this controversy. There was evidence of the records kept at the nearest weather bureau at Duluth of a number of previous storms whose recorded velocity in mileage was greater than the same records showed this one to be. But the office of this bureau is about four miles from the scene of the accident, and from the velocity of the wind as there recorded it does not follow but that it may have been much greater at this place. Indeed, the physical manifestations appearing from the evidence render it altogether probable that such was the fact. In the more immediate vicinity of this accident freight cars were blown over, buildings unroofed and moved, and large boards were carried through the air and upwards at such velocity as to drive them through the overhanging roof of an adjacent building with such force that they remained there; and other bridge structures in the vicinity were also blown down. Half a dozen witnesses, familiar with the location, testified that this was the most violent storm they had ever experienced at this place. From the oral evidence on this subject, which the District Court heard, not only are we unable to say that the court erred in concluding that this was a storm of unexampled violence, but from its perusal we are quite satisfied that had we heard it our conclusion would have been the same.

It is urged that, even conceding the storm to have been unprecedented in violence, there was negligence in operating the bridge practically up to the time it began to move, and in failing to have run the clam back under the bridge structure and raised the apron so it would not have been over the boat. It is true that the storm was a long time in breaking and reaching its full fury, and that the wind blew quite strongly for a considerable time before the accident. Appellee's superintendent had given orders to clamp down the bridge and hold it. The order did not say that it should not be operated. It was moved to a full hatch and then clamped down, as stated; but the work of unloading continued until very shortly before the accident. The evidence warrants the conclusion that just prior to the accident there was a very sudden and violent increase in the velocity of the storm, caused probably by the meeting there of two distinct storm centers, and that it was the sudden cyclonic action of the storm that caused the bridge to move as it did. In our judgment the operation of the bridge just before the accident was not such an unreasonable thing to be done as to amount to negligence on the part of appellee.

If the apron or extension had been raised it is more than possible that the bridge in falling would not have struck the boat, since it seems the main damage to the boat was done by the falling upon it of this apron which extended above it. The raising of the apron was not a trivial operation. The evidence varied as to the time required to raise it—from three to twelve minutes—and it could not be said that this structure, if in standing position about 80 feet upward from the bottom of the span, would not, in case of collapse, have fallen forward and upon the vessel, with even more damaging effect from the height to which it might have been raised. When the bridge collapsed

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there is no certainty that the apron would have fallen backward; indeed, it is very possible that it might have fallen in the direction toward which when raised to its full height it was normally inclined, viz., toward the boat. The apron when raised high above the span might through the action of the wind have had tendency to impart a twist to the span wholly apart from the skew action through movement of the trucks, and negligence might perhaps with equal show of reason have been attributed to the raising of the apron under such circumstances. The probable effect of the raising or lowering of the apron is entirely too speculative to predicate actionable negligence on what in fact was done.

In our judgment the evidence warranted the conclusion expressed by the District Court that the storm was "entirely unusual in its violence, and could not reasonably have been anticipated, and was the sole cause of the injury." For the consequences of such "act of God," unmixed with negligence, appellee was properly held to be not answerable.

The decree of the District Court is affirmed.

(258 Fed. 897)

UNITED STATES FIDELITY & GUARANTY CO. v. BLUM.*

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3239.

INSURANCE ⟸446—LIFE POLICY—"SUICIDE, SANE OR INSANE."

An exception from liability for death by "suicide, sane or insane," in a life policy includes self-destruction irrespective of the assured's mental condition at the time of the act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suicide, Sane or Insane.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Estelle M. Blum against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant brings error. Reversed.

This is an action by Mrs. Blum, widow and beneficiary named in a life insurance policy issued by the United States Fidelity & Guaranty Company, plaintiff in error herein. The complaint alleged that Samuel Blum, the insured, died at Seattle through external, violent, and accidental means; that proofs of death were duly furnished, but that the insurance company denied liability. The policy of insurance provided for loss of life against "the loss or disability resulting from bodily injuries effected directly and independently of all other cause through external, violent and accidental means (excluding suicide, sane or insane, or any attempt thereat)." The insurance company pleaded that the death of Blum was effected through suicide, or an attempt thereat, and not otherwise. After verdict in favor of Mrs. Blum, judgment was entered against the insurance company, and writ of error thereafter brought the cause to this court.

The substance of the evidence was that Mr. Blum was a prosperous business man, and happy in his domestic affairs; that on January 1, 1917, certain of his property in Alaska was burned, and that the news of the fire

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*Rehearing denied October 14, 1919.

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greatly depressed him for a time; that he did not sleep well, and was greatly worried about his business, and said he could not get the Alaska fire out of his mind; but that his condition of mind improved somewhat before January 12th, the day on which he died; that on that morning he and his wife went to a ship to see a friend sailing for Alaska; that later Mr. Blum went to his office, transacted some business there, and went to his home for lunch; that after lunch he took a nap and returned to his office; that he went to a barber shop, where he again seemed nervous and restless, and returned to his office about half past 4; that he walked up and down, and apparently was under mental strain and discouraged; that about 5 o'clock he complained to his associate that he could not collect his thoughts; that he stepped into his private office, leaving the door connecting with his outer office partly open; that his absence was noticed, and that immediately thereafter his body was found on the sidewalk two stories below. There was some testimony that a few days before his death he had had a fainting spell, and that he complained of feeling ill, and that when a feeling of faintness was coming upon him he would try to get fresh air. There was clear proof that he complained of lack of sleep, inability to collect his thoughts, and was more or less melancholy shortly before his death.

There is no positive evidence as to how he got out of the window, which was over 3 feet high from the floor, and had a sill 42 inches wide, and the lower sash being raised left an opening 2 feet 4½ inches wide and 2 feet 9½ inches high. But the contention of the plaintiff below was that he fell out involuntarily while trying to get air, and that his death was wholly involuntary and purely accidental, while the insurance company contended that he jumped out voluntarily, sane or insane, and that his death was suicide. As the case was properly for the jury, we need not dwell upon the evidence.

Peters & Powell, of Seattle, Wash., for plaintiff in error.

Preston, Thorgrimson & Turner and Lyons & Orton, all of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The principal assignments of error are directed to the instructions of the court. The insurance company requested the following instruction:

"It appears from the undisputed evidence in this case that on the 12th day of January, 1917, some time in the neighborhood of 5 o'clock in the afternoon, Samuel Blum was in his office in the Pacific Block in the city of Seattle; that this office had an opening to the city street through a window or series of windows fronting thereon; that Blum was last seen alive in this room; that almost immediately thereafter his body was found lifeless on the sidewalk pavement, which he must have reached through this window opening of his office. The question, after all, for you to determine, then, is as to whether Blum came out of this window intentionally or unintentionally. If you are satisfied by a greater weight of evidence that it is more probable that he came out or through the window intentionally than that he did it by accident or unintentionally, then the burden of proof placed upon the defendant by the presumption of law existing against suicide will have been supported by the defendants, and your verdict should be for the defendant."

The court gave the instruction, but added the following:

"I don't think that that instruction could possibly mislead you, but to avoid any chance that it may, I wish to qualify it somewhat. It is stated therein that the question is as to whether he came out of the window intentionally or unintentionally. Now suicide is the intentional taking of one's life. Therefore, to constitute suicide on the part of Blum in jumping or throwing himself from that window, the following elements would be necessary: That is, that he voluntarily came through the window; that he knew when he did voluntarily come through the window that it would probably result in his death;

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and that he did jump or throw himself from the window with the idea of ending his life and killing himself."

Counsel for the insurance company excepted to that part of the qualifying charge which stated in effect that one alleged to have committed suicide must know at the time that his act would probably result in death or in fatality.

The position of the insurance company is that by the qualification the jury were instructed that if they found that Mr. Blum was insane, and that he went through the window without a conscious intent of self-destruction, they could not find that he committed suicide.

A study of the opinions of the courts upon the subject of provisos and clauses similar to the one under consideration tells us that after the decision of the Supreme Court in 1872 in Insurance Co. v. Terry, 15 Wall. 580, 21 L. Ed. 236, wherein it was held that a proviso in a contract of life insurance against death by suicide did not include a self-killing which was not intentional, and that, when the deceased did not realize the physical nature and consequences of his act, and took his own life, being impelled by an irresistible, insane impulse, it was not his act, and no more than an accident, changes in the language of contracts of insurance were frequently made with a view of excluding a certain manner of death from the risk assumed by the insurers. The changed forms often provide that the insuring company does not assume the risk of self-destruction, sane or insane. In Bigelow v. Berkshire Insurance Co., 93 U. S. 284, 23 L. Ed. 918, the policy contained a condition of avoidance if the insured should die by suicide, sane or insane. The court said:

"The words of this stipulation 'shall die by suicide (sane or insane),' must receive a reasonable construction. If they be taken in a strictly literal sense, their meaning might admit of discussion; but it is obvious that they were not so used. 'Shall die by his own hand, sane or insane,' is doubtless a more accurate mode of expression; but it does not more clearly declare the intention of the parties. Besides, the authorities uniformly treat the terms 'suicide' and 'dying by one's own hand,' in policies of life insurance, as synonymous, and the popular understanding accords with this interpretation. * * * Life insurance companies indiscriminately use either phrase, as conveying the same idea. If the words 'shall commit suicide' standing alone in a policy import self-murder, so do the words 'shall die by his own hand.' Either mode of expression, when accompanied by the qualifying words, must receive the same construction. * * * Nothing can be clearer than that the words 'sane or insane' were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, and well-understood meaning. No one could be misled by them; nor could an expansion of this language more clearly express the intention of the parties. * * * It is unnecessary to discuss the various phases of insanity, in order to determine whether a set of circumstances might not possibly arise which would defeat the condition. * * * For the purposes of this suit it is enough to say that the policy was rendered void if the insured was conscious of the physical nature of his act, and intended by it to cause his death, although, at the time, he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing. * * * To say that the company will not be liable if the insured shall die by 'suicide, felonious or otherwise,' is the same as declaring its nonliability if he shall die by 'suicide, sane or insane.'"

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In Clarke v. Equitable Assurance Society, 118 Fed. 374, 55 C. C. A. 200, the policy provided that—

"Self-destruction, sane or insane, within one year from the date of the issuance of the policies, is a risk not assumed by the society in this contract."

The Court of Appeals carefully reviewed the decisions, and concluded that the insurer was not liable. The reasoning was that the proviso had no words which limited its operation to intentional suicide, but that the insurer contracted that it would not assume the risk of self-destruction, sane or insane. To a contention that self-destruction would avoid the policy if the insured lacked intelligence to know that his act was wrong, but that the policy would not be avoided if he did not understand the physical nature of his act, the court said:

"To sustain such contention would require us to believe that the deceased shot himself through the head because he did not know that it would kill him. Instead of giving to the words of the proviso the plain meaning for which they were manifestly intended—that the insurer intended to guard itself from liability if the insured came to his death from any physical movement of his own, whether sane or insane—we would lose ourselves in consideration of the different phases of insanity, be compelled to split it into degrees, and to hold that, if he was so entirely insane as not to understand the physical consequences of his act, the proviso would be avoided, while a lesser degree of insanity would make the company liable."

In the more recent case of Moore v. Northwestern Mutual Life Insurance Co., 192 Mass. 468, 78 N. E. 488, 7 Ann. Cas. 656, the Supreme Court of Massachusetts referred to Bigelow v. Berkshire Life Insurance Co., supra, and pointed out that in the pleadings in that action a replication, alleging that the insured, when he inflicted the pistol wound upon his person by his own hand, was of unsound mind and wholly unconscious of his act, was held to be bad as against a demurrer, and quoted approvingly from De Gogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232. In that case the trial judge charged that if the act causing the death of the assured was an involuntary act of one incapable of exercising his will, then the company would be liable, but the Court of Appeals in New York held that such an instruction was erroneous, and that the words, "sane or insane," incorporated in the policy meant just what those words commonly import, "and that is, if death ensues from any physical movement of the hand or body of the assured proceeding from a partial or total eclipse of the mind, the insurer may go free." As specially pertinent to the case before us, the Court of Appeals said:

"We are not altogether unmindful of the force of the proposition that a man does not die by his own hand who has not sufficient mind to will his own death, and it is not, perhaps, entirely easy to see in what precise words in our language the idea may be accurately and artistically expressed that a totally insane man may take his own life. But the question seems to involve more—the refinement of language—than the application of practical sense, and we are of the opinion that, in the common judgment of mankind, it will be considered that when a totally insane man blows his brains out with a pistol that he will be said to have died by his own hand within the meaning of a policy such as we have now under consideration."

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In the support of the approval of these views the Supreme Court of Massachusetts cites Travelers' Insurance Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; Clarke v. Equitable Assurance Society, supra, and other cases. The conclusion of the court was that on reason and authority the words "sane or insane" cover every case of suicide, and that where self-destruction was clearly shown, it made no difference what the state of mind of the person committing the suicide was. In Billings v. Accident Co. of North America, 64 Vt. 78, 24 Atl. 654, 17 L. R. A. 89, 33 Am. St. Rep. 913, the policy provided that there would be no liability if death resulted from suicide, sane or insane, and the court held that this clause included self-destruction irrespective of the assured's mental condition at the time of the act, and that the court, in an action on the policy, would not attempt to measure the degrees of insanity. Adkins v. Columbia Life Ins., 70 Mo. 27, 35 Am. Rep. 410.

These opinions appear to us as logical and fair interpretations of the plain words used in the contract of insurance. If the insured fell out of the window by accident or in a faint, and was killed by the fall, of course there could be a recovery. But if he, of his own physical motion, went through the window and so destroyed himself, then under the contract the insurer can avoid liability, and it would matter not what the mental condition of the insured was. The effect of the qualification to the instruction quoted was a direction that, although death may have resulted from the physical act of going through the window, suicide could not be found unless deceased intended to kill himself, and knew that his act would probably result in death. And this we hold was a material error.

We cannot sustain the contention of the insured that the statutory definition of suicide as the "intentional taking of one's own life," found in the Criminal Code of the state of Washington (section 2385, vol. 1, Rem. & Bal. Ann. Codes) is controlling. That provision has to do with offenses against the public, but is not decisive in cases of private rights.

The judgment is reversed, and the cause is remanded, with directions to grant a new trial.

Reversed and remanded.

(258 Fed. 901)

PENN MUT. LIFE INS. CO. v. BLUM.*

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3241.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Estelle M. Blum against the Penn Mutual Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hartman & Hartman, of Seattle, Wash., for plaintiff in error.

Preston, Thorgrimson & Turner and Lyons & Orton, all of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

*Rehearing denied October 14, 1919.

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HUNT, Circuit Judge. This cause was tried jointly with United States Fidelity & Guaranty Co. v. Blum, 258 Fed. 897, 169 C. C. A. 617, and by stipulation the facts of that case are to be considered herein. Inasmuch as the questions of law are also the same as in the other case, upon the authority of the decision therein, the judgment is reversed, with directions to grant a new trial.

(258 Fed. 902)

THE ADRIATIC.

(Circuit Court of Appeals, Third Circuit. June 7, 1919.)

No. 2463.

1. ADMIRALTY ⟸72—INTERNATIONAL LAW ⟸10—COMITY.
On principles of international comity, a United States court is bound to accept a suggestion of the British ambassador that the British government requisitioned a certain British ship at a certain time.

2. INTERNATIONAL LAW ⟸10—BRITISH SHIP—COMITY.
A United States court, in a libel against a British ship, on suggestion by the British ambassador, appearing as amicus curiæ, that the ship has been duly requisitioned by the British government, is not at liberty to consider the question of the validity of the requisition, or to consider a claim by libelant, alleging breach of a charter party, that the British government did not have power to requisition the vessel, because the vessel at the time was on the high seas.

3. ADMIRALTY ⟸39—COMITY—DISMISSAL WITHOUT PREJUDICE.
Where a United States court, hearing a libel of a British ship based on an alleged breach of a charter party, cannot consider the questions involved by reason of the British ambassador having suggested that the vessel was duly requisitioned by the British government, it will dismiss the proceedings without prejudice to the right of the libelant to institute another action in some court which is in a position to pass upon the question of the validity of the suggested requisition.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Libel in rem by H. Baars & Co. and the Export Terminal & Shipping Company against the British steamship Adriatic, and in personam against the owners, W. H. Cockerline & Co., to recover damages. From a decree in favor of the respondents (253 Fed. 489), the libelants appeal. Affirmed.

Howard T. Kingsbury and Frederic R. Coudert, both of New York City, for British Embassy.

Willard M. Harris, of Philadelphia, Pa., and John C. Avery, of Pensacola, Fla., for appellants.

John M. Woolsey, of New York City, Howard H. Yocum, of Philadelphia, Pa., and Harry D. Thirkield, of New York City, for appellees.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

HAIGHT, Circuit Judge. H. Baars & Co., a corporation of Delaware, filed in the court below a libel in rem against the British steamship Adriatic, and a libel in personam against the owners, W. H. Cockerline & Co., a British concern, to recover damages which it

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claimed to have sustained by reason of an alleged breach of a charter party that had been entered into, on September 28, 1916, between the owners of the steamship and the Export Terminal & Shipping Company, and which had been assigned by the latter to the libelants prior to the alleged breach. The original charterer subsequently, by petition of intervention, became a colibelant in the suits. The charter was for a single voyage from an American port to a European port, and was to become effective upon the arrival of the vessel at the port of Philadelphia, Pa., where orders were to be given at once by the charterers. On November 8, 1915, while the vessel was on the high seas, the Transport Division of the British Admiralty notified the owners in England, by telegram, which was confirmed by letter sent to them the following day, that the ship had been requisitioned for government service. Instructions, to be given to the master when the vessel should reach Philadelphia, were also cabled to the British consul general at Philadelphia. Although the owners endeavored to have the requisition canceled and the vessel released, they were unsuccessful. She reached Philadelphia on November 28, 1915, and on the next day the master was notified by the British consul general that she had been requisitioned, and he was given certain instructions as to her further movements, which, with the concurrence of the owners, he obeyed, and which made it impossible for the vessel to fulfill the charter. The vessel remained continuously in the government service from that time until she was lost at sea about a year later.

Before the case came on for trial, but long after the vessel had been released from arrest under bond given by the owners, a suggestion was filed by counsel for the British Embassy, appearing as amici curiæ, to the effect, among other things, that the steamship, which was of British registry and belonged to subjects of Great Britain, had been "duly requisitioned by the British Admiralty, which is an integral part of the government of the United Kingdom of Great Britain and Ireland," and that the requisition was "a governmental action by the government of Great Britain, and should not be inquired into by" the court in which the cause was pending. Considerable testimony was taken by the respondents as to the legality of the requisition and as to the effect of a refusal by the master of the vessel or the owners to obey the instructions of the Admiralty and of the British consul general at Philadelphia, and as to what the British government could have done to compel obedience to them. No testimony was offered by the libelants on any of these points.

[1] The learned judge of the court below, feeling that under the circumstances he should decline to adjudicate "any claim of right advanced by the libelants" which grew out of the requisitioning of the vessel by the British government, dismissed the libels. Thereupon the libelants appealed. In addition to the before-mentioned suggestion filed in the court below, there has been filed in this court, under the hand of the British ambassador and the seal of the British Embassy, a certificate wherein are set forth the same facts as were set forth in the suggestion, and an express avowal again made that the requisition of the steamship was "a governmental act by the government of Great

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Britain and Ireland." On principles of international comity, we feel bound to accept the suggestion and avowal of the British ambassador as conclusively establishing both the fact of the requisition and its governmental character. Such has been the practice, as to similar facts, of the English courts (The Parlement Belge, L. R. 5 P. D. 197; The Constitution, L. R. 4 P. D. 39), and quite generally of the courts of this country. See The Marpo (D. C. S. D. N. Y.) 252 Fed. 627; Agency of Can. Car & F. Co. v. American Can Co. (D. C. S. D. N. Y.) 253 Fed. 152; The Roserie (D. C. N. J.) 254 Fed. 154, where the suggestions were made directly by counsel for an embassy, and The Exchange, 7 Cranch, 116, 3 L. Ed. 287, where it was made through the attorney for the United States.

It must be considered as established, therefore, that the vessel was actually requisitioned by the British government, acting through the Admiralty, before the time arrived for her to perform the charter. The charter party contained the following clause, viz.: "If vessel be requisitioned by the British Admiralty, this charter is to be null and void." As the vessel was requisitioned by the British Admiralty, that provision of the charter party would seem to relieve absolutely the owners from any liability growing out of her failure to perform the charter. The libelants contend, however, that it does not have that effect, because, as it is claimed, the British Admiralty had no power, under the English law, to requisition the vessel when the attempt to do so was made, because she was then upon the high seas and not within the British Isles or the waters adjacent thereto. Of course, that contention, if correct, to have any effect, must necessarily be predicated upon the assumption that the provision in question of the charter party referred only to such requisitions of the British Admiralty as should be strictly legal and in accordance with the laws of Great Britain, as distinguished from requisitions which might in fact be made by the Admiralty, but which were beyond its legal power and authority to make.

[2] Assuming, for purposes of argument only, that such is a proper construction of the charter party, it is apparent that, if the vessel was legally requisitioned, no liability attached to the respondents by reason of the failure of the vessel to thereafter perform the charter, because, upon such a requisition, the charter party, by its express terms, became null and void. But, in accordance with the rule that "the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory," it is not within the province of a court of this country to attempt to determine whether the requisition of the vessel was valid or invalid under the laws of Great Britain; it must be here accepted as legal, or, as it is sometimes expressed, such a question is not justiciable. Ricaud v. American Metal Co., 246 U. S. 304, 309, 38 Sup. Ct. 312, 62 L. Ed. 733; Underhill v. Hernandez, 168 U. S. 250, 253, 18 Sup. Ct. 83, 42 L. Ed. 456; American Banana Co. v. United Fruit Co., 213 U. S. 347, 357, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047; Oetjen v. Central Leather Co., 245 U. S. 297, 303, 38 Sup. Ct. 309, 62 L. Ed. 726; The Invincible, 2 Call. 29, Fed. Cas. No. 7,054; Hewitt

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v. Speyer, 250 Fed. 367, 162 C. C. A. 437 (C. C. A. 2d Cir.); Earn Line S. S. Co. v. Sutherland S. S. Co. (D. C. S. D. N. Y.) 254 Fed. 126. Hence it follows that, even if the charter party be construed as libelants must have it construed to raise the question of the validity of the requisition, no cause of action accrued to them from the failure of the vessel to perform the charter, so far as the courts of this country are at liberty to determine. This conclusion has rendered it unnecessary for us to consider or decide any of the other questions which have been raised.

[3] The decree will accordingly be affirmed, with costs. However, in order that there may be no possible misunderstanding in the future as to the effect of the decree, we deem it proper to expressly state, what we think is necessarily to be inferred from the action of the court below, that the libels are dismissed without prejudice to the right of the libelants to institute another action in any court which is in a position to pass upon the question which, as above stated, we have not felt at liberty to inquire into.

(258 Fed. 905)

SETTON v. EBERLE-ALBRECHT FLOUR CO.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1919. Rehearing Denied July 22, 1919.)

No. 5213.

1. SALES ⟸418(2)—BREACH OF CONTRACT TO DELIVER—MEASURE OF DAMAGES—"PLACE OF DELIVERY."

When contracts for the sale of chattels are broken by vendor failing to deliver, the measure of damages is the difference between the contract price and the market price of the article at the time when and the place where it should have been delivered, with interest; the place of delivery meaning the place where title passes.

2. SALES ⟸418(12)—BREACH OF CONTRACT—MEASURE OF DAMAGES—RESALE CONTRACTS.

If a buyer of chattels has, in advance, made a contract for resale, and discloses such fact to his vendor, who undertakes to furnish the commodity and deliver it at a specified time and place, so that the buyer may fulfill his resale contract, but the vendor fails to do so, he will be liable on the basis of the profits the vendee would have realized on his contract of resale.

3. SALES ⟸418(12)—BREACH OF CONTRACT TO DELIVER—MEASURE OF DAMAGES—"C. I. F."

Where a flour merchant in Alexandria, Egypt, brought an action for breach of a contract to buy of a corporation in St. Louis, Mo., "2,000 bags 'White Owl' at 23/6 per 280 lbs. c. i. f. Alexandria, all August shipment," but failed to allege special damages, or facts showing an exception to the general rule of damages, the measure of damages was the difference between the contract price and the market price at St. Louis, and not the difference between the contract price and the market price in Alexandria; the contract not being one technically for resale, and the letters "c. i. f." merely meaning "cost, insurance, and freight."

Carland, Circuit Judge, dissenting.

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In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Jacques Setton, doing business as Jacques Setton & Co., against the Eberle-Albrecht Flour Company, for breach of contract. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed.

Frank H. Sullivan, of St. Louis, Mo. (Clement A. Lawler, of Kansas City, Mo., and George F. Haid, of St. Louis, Mo., on the brief), for plaintiff in error.

Rhodes E. Cave, of St. Louis, Mo. (A. G. Eberle and George H. Williams, both of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The plaintiff, Setton, a flour merchant of Alexandria, Egypt, brought this action against the defendant, the Eberle-Albrecht Flour Company, of St. Louis, Mo., for a breach of the following contract, dated July 11, 1914:

"We offer to buy of you 2,000 bags 'White Owl' at 23/6 per 280 lbs. c. i. f. Alexandria, all August shipment."

This offer was accepted by cable. The contract was wholly by correspondence and cable. The defendant failed to deliver the flour, as performance became difficult by the breaking out of the World War early in August. Probably the principal cause of the breach was obstruction to shipping facilities. It may also be that enhancement of price was a factor. It is not claimed that either of these causes was legal justification for the breach. In the trial court the case turned wholly on the proper measure of damages; plaintiff insisting that they should be based on the difference between the contract price and the market price at Alexandria, and the defendant on the difference between the contract price and the market price at St. Louis. The trial court held with defendant, and excluded evidence as to prices in Egypt, and, as plaintiff offered no evidence of market price at St. Louis, it directed a verdict in favor of defendant at the conclusion of plaintiff's case, and entered judgment accordingly. Plaintiff brings error to review that judgment.

Some time was spent in the trial court explaining the letters c. i. f. They mean "cost, insurance, and freight." Their significance was explained by Lord Justice Blackburn, in Ireland v. Livingston, L. R. 5 H. L. 395, 406, in language quoted in Williston on Sales, page 408, and in the fourth edition of Benjamin on Sales, section 891. The Lord Justice concludes his statement as follows:

"In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way."

The duty which this feature of the contract imposed upon the seller has no bearing upon the question now under review.

[1] The general rule as to damages is stated by Sedgwick, at section 734, as follows:

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"When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time * * * when and the place where it should have been delivered, with interest."

The same rule is expressed in slightly different language, and a multitude of cases cited, in the fourth edition of Sutherland on Damages, at section 651.

The words "place of delivery" in the rule, mean the place where title passes. If the goods are to be shipped by carrier, this will be the place at which they are delivered to the carrier. If there is no local market at that place, the words have been enlarged to include places in the same vicinity where there is a market; allowances being made for freight. The rule as stated by Sedgwick has been adopted by the federal courts (Grand Tower Co. v. Phillips, 23 Wall. 471, 23 L. Ed. 71; Globe Refining Co. v. Landa Cotton Co., 190 U S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171; Saimon v. Helena Box Co., 147 Fed. 408, 412, 413, 77 C. C. A. 586), and by all state courts entitled to speak with authority on such a subject (Cahen v. Platt, 69 N. Y. 348, 25 Am. Rep. 203; Rahm v. Deig, 121 Ind. 283, 23 N. E. 141). An examination of these authorities will show that using the market price at the place of ultimate receipt by the consignee in measuring damages has resulted in a reversal in all ordinary mercantile transactions.

[2] To the general rule there is an exception, which is accurately expressed in Sutherland on Damages, section 662, page 2343, as follows:

"If the buyer has, in advance, made a contract for resale, and discloses that fact to his vendor, who undertakes to furnish the commodity and deliver it at a specified time and place, arranged with reference to enabling the buyer to fulfill his contract for resale, and the vendor fails to deliver the property, he will be liable for damages on the basis of the profits the vendee would realize upon his contract for such resale."

This exception is well illustrated and explained in Rahm v. Deig, 121 Ind. 283, 23 N. E. 141; Howard Supply Co. v. Wells, 176 Fed. 512, 100 C. C. A. 70; West Drug Co. v. Byrd, 92 Fed. 290, 293, 34 C. C. A. 351; Southern Flour & Grain Co. v. McGeehan, 144 Wis. 130, 128 N. W. 879.

Mere knowledge that goods are purchased for resale in the ordinary course of business will not take the transaction out of the general rule and place it under the exception. If that were not so, the exception would swallow up the general rule completely, for it is always known that, when goods are bought from a manufacturer by a broker or wholesaler, or by a retailer from a jobber, the buyer purchases for resale. To bring a case within the exception, the buyer must have an existing contract for resale at the time of the purchase, and must buy for the purpose of enabling himself to perform his obligations on the resale, and these features must be clearly explained to the seller, and he must enter into his contract for the purpose of enabling the buyer to perform his obligations under the contract of resale. The same result will follow if the buyer is acting as the agent of the seller,

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as in Cook Mfg. Co. v. Randall, 62 Iowa, 244, 17 N. W. 510, and McCormick Harvesting Co. v. Jensen, 29 Neb. 102, 45 N. W. 160.

It will be found, upon a careful examination of authorities entitled to be considered, that in order to take a case out of the general rule there must be present some special feature, such as those to which we have adverted. Such special features must be sufficient to take the case out of the special title of Sales and place it under the general law of Contracts. Then the rule of Hadley v. Baxendale, 9 Exch. 341, as qualified by later decisions, may control. Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. Mere knowledge that goods are purchased for resale is not sufficient to produce that result. One reason for this is that the market price at the place where the goods are to be resold carries the transaction one stage nearer the ultimate consumer than the original sale, and always shows a higher market value than that which controlled between the original buyer and seller. It would be manifestly unjust to measure the damages by a market value thus enhanced. This feature is well explained by Judge Adams, speaking for this court, in Salmon v. Helena Box Co., 147 Fed. 408, 412, 413, 77 C. C. A. 586.

[3] It is likewise true that all courts regard the damages, when they are measured by the exception, as special damages, and the facts showing that the exception ought to apply must be pleaded in the complaint. No such allegations are contained in the complaint in this case, and a reading of the correspondence between the parties convinces us that the facts would not justify such claim.

The ruling of the trial court was therefore right, and its judgment is affirmed.

CARLAND, Circuit Judge, dissents.

(258 Fed. 908)

GOLDSTEIN v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. May 26, 1919.)

No. 3289.

1. ARMY AND NAVY ⟸40—INTERFERENCE WTH ARMED FORCES OF UNITED STATES —OFFENSES.

The exhibition of a picture during the existence of the war with Germany, calculated to sow discord between the people of the United States and the British Empire by arousing feelings of indignation by portraying scenes in which British soldiers were depicted during the Revolutionary War as murdering noncombatant Americans, is a violation of Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), making it an offense for any person when the United States is at war to willfully cause or attempt to cause insubordination, mutiny, or refusal of duty in the armed forces of the United States, for the depicting of such scenes might cause insubordination, etc., of armed forces operating in connection with the British.

2. ARMY AND NAVY ⟸40—INTERFERENCE WITH ARMED FORCES OF UNITED STATES—OFFENSES.

An indictment, charging that defendant, by the exhibition of a moving picture calculated to cause feelings of indignation against England, vio-

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*Rehearing denied October 14, 1919.

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lated Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), making it an offense for any person to cause, or attempt to cause, insubordination, mutiny, or refusal of duty in the armed forces of the United States, *held* sufficient, in view of the fact that millions of men were being drafted, though it did not aver that soldiers witnessed the exhibition of the picture; it being alleged that the picture was publicly exhibited.

3. ARMY AND NAVY ⇐40—ESPIONAGE ACT—INDICTMENT—SUFFICIENCY.
An indictment *held* to charge a violation of the Espionage Act, in that it alleged that defendant in aid of the German government had control of and was using a motion picture calculated to arouse feelings of enmity between the people of the United States and the British Empire, for the purpose of violating Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), making it an offense for any person to cause or attempt to cause any insubordination or refusal of duty in the armed forces of the United States.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Robert Goldstein was convicted, under Act June 15, 1917, of knowingly, willfully, and unlawfully attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States during war, and he brings error. Affirmed.

The plaintiff in error was convicted on two counts of an indictment, the first of which charged as follows: "That throughout the period of time from the 6th day of April, in the year of our Lord one thousand nine hundred and seventeen, to the day of the finding and presentation of this indictment, the United States has been at war with the Imperial German government, and that during said period of time one Robert Goldstein, whose full and true name other than as herein stated is to the grand jurors unknown, hereinafter called defendant, in the city of Los Angeles, state of California, and within the Southern Division of the Southern District of California and within the jurisdiction of this honorable court, did, on the 28th day of November, in the year of our Lord one thousand nine hundred and seventeen, knowingly, willfully and unlawfully attempt to cause insubordination, disloyalty, mutiny, and refusal of duty, in the military and naval forces of the United States in the manner following, that is to say:

"That at the time and place aforesaid, the said Robert Goldstein did present to the public at Clune's Auditorium Theater, a certain motion picture play, entitled and known as 'The Spirit of '76,' which said motion picture play was designed and intended to arouse antagonism, hatred, and enmity between the American people, and particularly the American military and naval forces, against the people of Great Britain, and particularly against the military and naval forces of Great Britain at a time when, as the defendant then and there well knew, the government of Great Britain with its military and naval forces was an ally of the United States in the prosecution of the war as aforesaid against the Imperial German government; that among the scenes so presented in said motion picture play, 'The Spirit of '76,' there was, at the time and place aforesaid, presented to the public in said picture the scene of a soldier of Great Britain whirling an American infant around on the point of his bayonet, and the scene of British soldiers in the act of shooting and bayoneting helpless and defenseless American women and children and dragging American women and children by their hair and capturing and carrying away young American girls, and many other scenes of like character, all of which were designed and intended and were being used for the purpose of causing insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States."

There was a demurrer to each count of the indictment for its failure to state an offense against the laws of the United States, and a motion to quash which specifically pointed out the absence of allegation showing the proximity

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of military or naval forces of the United States, or that they could be affected thereby. The demurrer and the motion were overruled.

Crittenden Thornton, of San Francisco, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., and W. F. Palmer, Sp. Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The demurrer and the motion to quash raised the question whether or not either count of the indictment alleged an offense against the United States.

[1] We will first consider the count which charges an attempt to cause insubordination and disloyalty or refusal of duty. The statute, Act of June 15, 1917, is clear and simple in its language. Whoever, when the United States is at war, shall willfully cause, or attempt to cause, insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, shall be punished as provided. The question of the truth or falseness of the thing done by the person who, when the state of war exists, attempts to cause disloyalty or any of the other conditions enumerated, is not the essence of the inquiry. Enacted as the statute was while the country was at war, the evident, underlying purpose of its language was to prevent any willful attempt to engender feelings of lack of fidelity to the United States among the military or naval forces or any attempt made with evil mind to cause any disobedience to lawful authority in the military or naval forces; and the statute should always be read in the light of the purpose of its enactment.

It is clear that an attempt to create disloyalty may be by showing a picture to the public, as well as by uttering speech or publishing a writing. The picture might be a truthful representation of an historical fact, and yet the nature of it, the circumstances surrounding the exhibition thereof, the time, the occasions when the public exhibitions are had, may well tend to show whether the picture would naturally, in the light of great events, be calculated to foment disloyalty or insubordination among the naval or military forces. In time of peace, a picture purporting to show incidents of a war fought more than a hundred years before, and exhibiting soldiers of a foreign country bayoneting helpless American women and children, might arouse but ordinary interest. But, if it has come about that a war is being fought by the United States and in the war the cause of the United States is allied with that of the foreign country whose soldiers are pictured as murdering American women and children, and if, at the time the United States is enforcing draft laws and raising a large army and navy to fight the common enemy of the two allied countries, it seems but reasonable to say that the exhibition of such a picture is calculated to arouse antagonisms and to raise hatred in the minds of some who see it against the ally of the United States, and as a probable effect to put obstruction in the way of the necessary co-operation between the allied countries against the enemy, and to undermine an undivided sentiment for the United States and to encourage disloyalty and refusal of duty or insubordination among the military and naval forces. Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470.

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[2] Nor, in an attempt of the character indicated, is it necessary that the picture exhibited should actually be seen by soldiers and sailors already enlisted. Millions of men within the provisions of the conscription act and subject to call were in the military and naval forces throughout the country and were part of the public. The exhibition to the public at a public place, if given with the evil intent described, is sufficient. In Coldwell v. United States, 256 Fed. 805, 168 C. C. A. 151, the Court of Appeals for the First Circuit considered an objection to an indictment wherein it did not appear that the persons whom the defendant was alleged to have addressed were in the military or naval forces of the United States. The court said:

"The act makes it an offense to willfully 'attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States,' or to 'willfully obstruct the recruiting or enlistment service of the United States,' and its language is broad enough to include statements calculated to produce these results, when made in the presence of persons who are not in the military or naval forces of the United States, provided they are willfully made and with the intent set out in the act."

[3] The second count also charges a violation of the Espionage Act, in that it specifically alleges that the defendant, in the aid of the German Government, had control of and was willfully using the film as a means to violate section 3 of title 1 of the Act of June 15, 1917, c. 30, 40 Stat. 219 (Comp. St. 1918, § 10212c), the Espionage Act, in the manner as fully described in the first count of the indictment. The first count is referred to and drawn into the body of the second count by reference to the motion picture play "The Spirit of '76," and it is charged that it was designed and intended for use and was used as the means of violating section 3 of title 1, Act of June 15, 1917, c. 30, and title 11, § 22 (Comp. St. 1918, §§ 10212c, 10212i). When considered with the first count incorporated within it, we think the second count is sufficient.

We believe that the issues under the counts were properly for the jury, and, as the evidence upon which the verdict was predicated is not in the record, we must accept the verdict as sustained by the evidence.

The judgment is affirmed.

(258 Fed. 911)

CHASS v. UNITED STATES.*

(Circuit Court of Appeals, Third Circuit. June 26, 1919.)

No. 2476.

1. CRIMINAL LAW ⟸552(3)—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.
To justify a conviction of crime on circumstantial evidence, the latter must be such as to exclude every reasonable hypothesis but that of guilt.

2. RECEIVING STOLEN GOODS ⟸8(4)—EVIDENCE—SUFFICIENCY.
In a prosecution for violation of Act Cong. Feb. 13, 1913 (Comp. St. §§ 8603, 8604) for feloniously having in possession certain plush knowing it to have been stolen from an interstate freight shipment, evidence, although

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*Certiorari denied 250 U. S. 665, 40 Sup. Ct. 12, 64 L. Ed. —.

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circumstantial, *held* sufficient to sustain a verdict of guilty, based upon a finding that defendant had the requisite guilty knowledge that the goods were stolen.

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Philip Chass was convicted of violating Act Cong. Feb. 13, 1913, in feloniously having in his possession certain plush knowing it to have been stolen from an interstate shipment of freight. A new trial was denied, and he brings error. Affirmed.

H. P. Lindabury, of Newark, N. J., for plaintiff in error.

Samuel I. Kessler, of Newark, N. J., for the United States.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

HAIGHT, Circuit Judge. [1] The plaintiff in error, Philip Chass, and one Louis Rubin were convicted under an indictment which charged them with having violated an act approved on February 13, 1913 (37 Stat. L. 670, c. 50 [Comp. St. §§ 8603, 8604]), in that they feloniously had in their possession certain rolls or bolts of plush, which had theretofore been stolen while constituting a part of an interstate shipment of freight, knowing the same to have been stolen. Upon motion, the learned trial judge set aside the conviction of Rubin and granted a new trial to him, but declined to accord like treatment to Chass. It is not questioned that the goods were in the actual possession of the latter at the time alleged in the indictment, nor was any attempt made during the trial to controvert that part of the evidence produced by the government whch clearly warranted the inference that the goods, while in the possession of the Philadelphia & Reading Railway Company, and constituting a part of an interstate shipment of freight, were stolen from a railway car. The only alleged error now relied upon is the refusal of the court below to direct a verdict of acquittal as to Chass at the close of the whole case, upon the ground that the evidence was not sufficient to justify a finding that he had knowledge, when the goods came into his possession, that they had been stolen. There was, it is true, no direct evidence that he had such knowledge. But after a careful examination of the record, and bearing in mind the rule that to justify a conviction of crime on circumstantial evidence, the latter must be such as to exclude every reasonable hypothesis but that of guilt (Hart v. United States, 84 Fed. 799, 808, 28 C. C. A. 612 [C. C. A. 3d Cir.]; Glass v. U. S., 231 Fed. 65, 68, 145 C. C. A. 253 [C. C. A. 3d Cir]), we think that the inference could be legitimately drawn, from all the facts and circumstances which the testimony discloses, that he did have the requisite knowledge. Without even attempting to summarize all of the evidence or to point out the conflicts and contradictions therein, or attempted explanations of some incriminating facts, and lack of explanation of others, we are of the opinion that it was permissible for the jury to find therefrom the following salient facts: On March 6, 1918, Baxter, Kelly & Faust, manufacturers of plush in the city of Philadelphia, delivered 12 rolls or bolts of embossed plush, designed to be used for

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lining coffins, and aggregating something over 750 yards, to the Philadelphia & Reading Railway Company, at one of its stations in that city, to be delivered by freight to the National Casket Company at East Cambridge, Mass. During the same day, and while the car in which the goods were loaded was lying at one of the freightyards of the railway company in Philadelphia, it was broken into, and these rolls of plush stolen. About two months later they were found in the possession of the plaintiff in error (hereafter referred to as the defendant), under the circumstances to be hereinafter mentioned. The defendant had come to this country from Russia about five years before that time, and at first had "worked at pants," then had peddled paper bags and twine among retail grocers and small merchants. Subsequently he had been employed for about two years by his brother-in-law Rubin, when the latter was engaged in the dress business, and for about two months preceding the robbery he had been engaged in the same business on his own account. About the 1st of March, 1918, he embarked on what he termed the business of "jobbing in woolens and silks." In the early part of that month he rented a small office in an office building in the city of Newark, N. J., which was tenanted chiefly by lawyers and real estate dealers, etc., but he never caused his name, or the name under which he claimed to be trading, to be placed on the door; nor did any customers ever come to the office during usual business hours. In the latter part of March, 11 of these rolls were delivered to him at this office by an express company, having apparently been brought from New York City. They remained in the office, in their original packages, until the 4th of the following May, when, during a search of the office by certain police authorities of Newark and New York, they were discovered and seized. The defendant, who was present at the time of the discovery of the goods, when first interrogated by the police officials as to how he had come into possession of them, stated that he did not know where they had come from other than that they, as well as a considerable quantity of other goods of entirely different character that were found in the office, had been brought there by a man whom he referred to as "Benny," who was to call later and be paid for them; the defendant having agreed to buy them. Later in the day, when further interrogated at police headquarters in Newark, he again stated that, with the exception of a "few pieces of poplins and woolens" which belonged to him, all of the goods found in the place had been brought there by this "Benny" under the circumstances before mentioned. Upon the trial he gave an entirely different version of how the goods had come into his possession. He then testified that during the latter part of March, while he was in a store in New York City, a man whom he had never seen before, and who was introduced to him as one "I. Jacobs," was endeavoring to sell the plush in question to the concern in whose place of business the defendant then was, and, being unable to make a sale to that concern, he turned to the defendant, and asked him whether he would care to purchase it; that thereupon, after some bargaining, he (the defendant), purchased it, and it was delivered to him, as before mentioned, within a few days

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thereafter; and that shortly after it was delivered, Jacobs called upon the defendant in Newark, and the latter paid him $415 in cash for it, although he had not opened the packages or verified the quantity. He also testified that he paid Jacobs at the rate of 57½ cents per yard, notwithstanding that the prices at which the goods had been billed from the manufacturers to the National Casket Company ranged from 45 cents to 47½ cents only.

When one, charged with having stolen goods in his possession, makes a statement to the public authorities as to how he came to have them, and later, under oath, makes an entirely different statement, it seems quite impossible, in the light of the other circumstances above detailed, to escape the conclusion that reasonable men would be justified in drawing the inference therefrom that he knew or believed that the goods had been stolen. If he had come by them honestly or had no knowledge or reason to believe that they had been stolen, it is inconsistent with ordinary human conduct that he should have made two such utterly variant and irreconcilable explanations. In view of the contradictory statements, and the other circumstances of the case, the only hypothesis of innocence was that he had obtained possession of them in either one of the two ways that he had stated. It was unquestionably for the jury to decide whether either of the explanations which he gave was true, and, if neither were, they were certainly justified, in the light of the other circumstances in the case, in reaching the conclusion that he knew or believed that the goods had been stolen when he acquired them.

[2] As, therefore, there was substantial evidence from which the jury could find the requisite guilty knowledge on the part of the defendant, the trial court committed no error in declining to direct a verdict of acquittal.

Some question was raised on the argument, but it is not supported in the brief, that there was error in the charge to the jury in respect to reasonable doubt. An examination, however, of the charge of the learned trial judge convinces us that the case was properly and fairly submitted to the jury, both in respect to the questions of fact which it was necessary for them to decide, as well as the rules which were to govern them, in reaching their verdict.

The judgment below is accordingly affirmed.

(258 Fed. 914)

NORMA MINING CO. v. MACKAY.*

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3319.

1. EXECUTION ⊂=222(1)—NOTICE OF SALE—SUFFICIENCY.

Under Civ. Code Ariz. 1901, par. 2570, providing that "real property taken in execution shall be sold at the courthouse door of the county wherein situated between the hours of ten o'clock a. m. and four o'clock p. m.," notice of a sale "between the legal hours" on a date named held sufficient.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*For opinion denying rehearing and modifying judgment, see 258 Fed. 991, 169 C.C.A. 672.

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2. MORTGAGES ⟸510(3)—FORECLOSURE SALE—NOTICE.
In a notice of the sale of property under foreclosure decree, a description of the property as given in the mortgage is sufficient.

3. MORTGAGES ⟸529(6)—FORECLOSURE SALE—INADEQUACY OF PRICE.
Refusal of a district court to set aside a second sale of property under a foreclosure decree on the ground of inadequacy of price *held* not error.

Appeal from the United States District Court for the District of Arizona; William H. Sawtelle, Judge.

Suit by Hugh Mackay against the Norma Mining Company. From an order confirming a sale under decree of foreclosure, defendant appeals. Affirmed on condition.

See, also, 241 Fed. 640, 154 C. C. A. 398.

This is an appeal from an order confirming a sale under a decree of foreclosure of two mortgages. The cause has been before this court before in the case of Norma Mining Company v. Mackay, 241 Fed. 640, 154 C. C. A. 398.

The facts are these: On March 18, 1916, Mackay secured a judgment against the Norma Mining Company for $22,958.09, with interest and costs. On May 18, 1916, the property was sold. On April 27, 1918, upon motion of Norma Mining Company, a resale of the property was ordered, and notice thereof was published in a newspaper of general circulation. The notice of sale recited that the property described would be offered for sale "between the legal hours of sale on Wednesday, the 12th day of June, 1918," at the courthouse door of Mojave county in the town of Kingman, Mojave county, Ariz. Pursuant to notice so given, the property was sold to Mackay by special master on June 12, 1918, for $27,574.28. Appellant moved to set aside the sale and for a resale on the ground that the notice did not give sufficient notice of the time of sale, in that it did not definitely state the hour of sale, or sufficiently describe the property, particularly as to the machinery and equipment to be sold.

The statute of Arizona providing for sales under execution (section 2570, R. S. 1901) provides: "In case of real property, by posting notices in three public places in the county, * * * and publishing a copy thereof in some newspaper printed within the county, * * * for three weeks before the day of sale. Such notices shall notice the judgment, parties, amount and court in which it was rendered, and particularly describe the property to be sold. Real property taken in execution shall be sold at the courthouse door of the county wherein situated between the hours of ten o'clock a. m. and four o'clock p. m."

Grant H. Smith, Maurice T. Dooling, Jr., and Lloyd Macomber, all of San Francisco, Cal., for appellant.

Robinson & Robinson, of Denver, Colo., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] We think that the notice was sufficient. The day and place of sale were given, and it was published that the sale would be between the legal hours of sale. The law fixed the legal hours as between 10 a. m. and 4 p. m., and the presumption is that the sale was had between such hours. In Burr et al. v. Borden, 61 Ill. 389, where a sale was made under a mortgage contract, it was announced that sale would be held "on the first of March, 1860, between the hours of nine a. m. and four p. m." Upon objection to such an advertisement, the court held that it was sufficient, and said:

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"Persons who see the advertisement and desire to attend the sale can easily ascertain the hour by inquiring of the parties about to make the sale. If unwilling to wait at the appointed place, and if deceived by them and prevented from making the desired bid, the sale might be set aside. To require the advertisement to name the precise hour would lead to much practical inconvenience, and often necessitate a postponement of the sale. It is sometimes very desirable for the interests of the debtor to delay a sale for two or three hours in order to await the arrival of persons expected to bid; or, in consequence of a storm or some other unforeseen emergency. Moreover, if a particular hour were named in all cases, the question whether the sale had been held at the hour named would be a fruitful source of litigation. The mode adopted in this case has been so generally in use as the most convenient mode, and has been so free from any evil consequences, that we are not inclined to hold an advertisement in this form to be, of itself, a sufficient reason for setting aside a sale, the hours named being within the ordinary business hours of day."

In Evans v. Roberson, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701, sale of real estate was advertised to be held between the "lawful hours" of the day. The court held that the law fixed the hours of the day between which property must be sold, and that it was not necessary that the hour should be stated in the advertisement. Fitzpatrick v. Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681, cited by appellant is not pertinent because there the notice of sale bore no signature and gave no time or place of sale. In Bondurant v. Bondurant, 251 Ill. 324, 96 N. E. 306, the court refers to the statute as one which prohibits the sale unless the time of day is specified in the notice. In Jensen v. Andrews, 39 S. D. 104, 163 N. W. 571, the notice of sale recited that the property would be sold at the front door of the courthouse "on Saturday, the 14th day of February, 1914," etc. The court held the notice fatally defective because of failure to specify the hour of the day at which the sale would take place. The statute of South Dakota (Code Civ. Proc.) § 640, prescribes that the notice shall specify the time and place of sale, and that sale must be between the hours of 9 o'clock in the forenoon and the setting of the sun on that day. The Arizona statute quoted in the statement does not contain a requirement that the notice shall specify the time and place of sale, although the general provision is that sale shall be between the hours of 10 o'clock a. m. and 4 o'clock p. m.

We cannot find that the notice complained of was inherently defective, and in the absence of a substantial showing of probable prejudice to the rights of the appellant, we believe that the court was right in refusing to hold the notice insufficient.

[2] Appellant contends that the notice did not describe the property to be sold with sufficient certainty. But the description included within the notice is exactly as given in the mortgage under which the sale was made, and was sufficient.

[3] It is said that the consideration paid was inadequate. The property involved was first sold under decree of court on the 18th day of May, 1916, but, upon showing made by appellant that if a resale were had the property would probably sell for more, the first sale was set aside and another sale was ordered by the court. At the first sale Mackay, appellee herein, bought the property, paying therefor the amount of the judgment and costs. Now, two years later, the property has again

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been sold to Mackay, appellee, for the amount of the judgment and costs and interest due at the time of the last sale. Appellant, in the motion to set aside the last sale, sets forth that in June, 1918, when the sale was made, the United States government was endeavoring to sell bonds for war purposes, and that the condition of the money market made it difficult to interest people in the purchase of property, and that the price paid was grossly inadequate. The support for the alleged inadequacy of price is an affidavit made in 1916 by an experienced mining man who deposed that he knew the property, and that in his opinion in 1916 it had a value in excess of $100,000, and that since that time the value of mining machinery and silver mining property had greatly increased. The affidavit gives no detailed facts upon which the opinion as to the value rests.

The showing did not appeal to the District Court as sufficient for ordering another sale, and fails to impress us with the belief that the District Court erred in its action.

The matter of sale was long protracted, and we find no valid reason for holding that the order of confirmation last made should be disturbed. Pewabic Mining Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732.

The order denying the motion to vacate the sale is affirmed.

(258 Fed. 917)

KAUFMAN DEPARTMENT STORES, Inc., v. CRANSTON et al.

(Circuit Court of Appeals, Third Circuit. June 14, 1919.)

No. 2466.

1. NEGLIGENCE ⟸32(1)—CARE AS TO CUSTOMERS IN STORE.
   A storekeeper does not insure the safety of customers, but must merely exercise reasonable care to keep premises in a safe condition for their proper use.
2. NEGLIGENCE ⟸32(1)—STOREKEEPER'S LIABILITY TO CUSTOMER TRIPPED BY CARPET.
   A storekeeper is not liable to a customer, injured by tripping on a worn carpet, unless he knew, or should have known, of the defective condition in time to have repaired it, or warned the customer, or the general condition was such that he should have anticipated that it would become dangerous, unless repaired or replaced.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by Martha C. Cranston and James Cranston against the Kaufman Department Stores, Incorporated. Judgment for plaintiffs, and defendant brings error. Reversed, and new trial granted.

George C. Bradshaw, Charles F. Patterson, and Patterson & Bradshaw, all of Pittsburgh, Pa., for plaintiff in error.

W. D. Grimes, of Pittsburgh, Pa., for defendants in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

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HAIGHT, Circuit Judge. One of the defendants in error, while a customer in the department store of the plaintiff in error in the city of Pittsburgh, caught her foot in a tear or worn spot in a carpet or rug which covered one of the aisles of the store, and was thereby thrown to the floor. As a result she sustained personal injuries, to recover damages for which she and her husband brought this action, and were awarded judgment in the court below. The action was based upon the alleged negligence of the defendant in failing to maintain the carpet or rug in a safe condition. It is not disputed that, under the evidence, the question as to whether Mrs. Cranston's injuries were due to the defendant's negligence was for the jury.

[1, 2] The error relied upon for a reversal of the judgment is the failure of the trial judge to charge certain of the defendant's requests or points for instruction to the jury. Except one respecting contributory negligence, which we have found it unnecessary to consider, these requests embodied in substance the propositions that the defendant, as the proprietor of a department store, was not an insurer of the safety of its premises; that it owed to customers only the duty of exercising reasonable care to keep its store in a safe condition for their use; and that unless the defendant, before the accident, had actual knowledge of the defective condition of the carpet which plaintiffs claim caused Mrs. Cranston to fall, or, by reason of its having been in such a condition for so long a time, had constructive notice thereof, the plaintiffs could not recover. Although the learned trial judge instructed the jury that the plaintiffs' right to recover was dependent upon a finding that the defendant had been negligent in respect to the inspection or repair of the carpet, or both, and defined negligence to be "the want of ordinary care under all circumstances," we are unable to find that anywhere in his charge he covered the substance of the defendant's requests. Outside of the extent of Mrs. Cranston's injuries, the only controverted facts in the case were as to whether the defendant had actual knowledge of the worn-out condition of the carpet or rug before the accident, and as to the length of time it had been in a defective condition.

The proprietor of a store to which prospective customers are invited, like any other person who, expressly or impliedly, invites others upon his premises, is not an insurer of their safety while in the store, but owes to them merely the duty of exercising reasonable care to keep the store in a safe condition for their proper use. Toland v. Paine Furniture Co., 175 Mass. 476, 56 N. E. 608; Schnatterer v. Bamberger & Co., 81 N. J. Law, 558, 79 Atl. 324, 34 L. R. A. (N. S.) 1077, Ann. Cas. 1912D, 139; Albachten v. Golden Rule, 135 Minn. 381, 160 N. W. 1012; Chilberg v. Standard Furniture Co., 63 Wash. 414, 115 Pac. 837, 34 L. R. A. (N. S.) 1079. We are unable to interpret the decisions of the appellate courts of Pennsylvania, in Woodruff v. Painter & Eldredge, 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451, 30 Am. St. Rep. 786, Bloomer v. Snellenburg, 221 Pa. 25, 69 Atl. 1124, 21 L. R. A. (N. S.) 464, Polenske v. Lit Bros., 18 Pa. Super. Ct. 474, and Sidwell v. Gimbel Bros., 52 Pa. Super. Ct. 286, as

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enunciating any different rule. As a consequence of that rule, it of course follows, in a case such as this, where the defective condition was not a structural one, as it was in some of the before-cited Pennsylvania cases, but was due to the carpet or rug becoming out of repair, that, before the defendant could be charged with a failure to perform its duty to Mrs. Cranston, it was necessary for the jury to find, either that the defendant had actual knowledge of the worn-out or defective condition of the carpet a sufficient length of time before the accident happened to have enabled it to repair it, or to have warned Mrs. Cranston of its condition, or that its actual condition, at the time of the accident, had existed for such a length of time prior thereto that the defendant, in the exercise of reasonable care, should have discovered it before the accident and remedied it, or that its general condition before the accident was such that, in the exercise of reasonable care, the defendant must have anticipated that it would, in all probability, unless repaired or replaced, become dangerous to customers or persons lawfully passing over it.

The defendant's requests or points for instructions were therefore, in the main, proper, although, as actually framed, they perhaps did not express the rule just as we have above stated it. As they, or the rule of law intended to be conveyed by them, were not covered in the charge, and thus, as the jury's attention was not directed to the crucial points on which, under the evidence, the liability or nonliability of the defendant depended, we think there was error in declining to charge them, at least in substance.

It follows that the judgment must be reversed, and a new trial granted.

(258 Fed. 919)

ELLIS v. REED.

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 2811.

APPEAL AND ERROR ⊂=1194(1)—MANDATE AND PROCEEDINGS IN LOWER COURT. Where the mandate of the Circuit Court of Appeals on reversal of an equity cause permitted appellee to file a motion for rehearing to enable him to introduce competent evidence on an issue, which was done and an order for rehearing made, but because of the prior ending of the term such motion was not available, the order may on petition for prohibition, properly be treated as one for further examination of the issue on which reversal was ordered.

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska.

Suit by J. L. Reed against M. A. Ellis. Decree for complainant was reversed (238 Fed. 341, 151 C. C. A. 357), and cause remanded. On petition by appellant for writ of prohibition. Denied.

This proceeding grows out of the order made by this court in Ellis v. Reed, 238 Fed. 341, 151 C. C. A. 357, to which reference is had to explain the nature of the suit. This court reversed the decree of the District Court, and remanded the cause to the court below, "to afford the appellee the opportunity

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to take such proceedings as are suggested in Roemer v. Simon, 91 U. S. 149, 23 L. Ed. 267." Ellis has now applied to this court for writ of prohibition, and, after setting forth the order of the Court of Appeals, alleges that on July 11, 1917, a petition for rehearing was presented to the District Court; that on July 11, 1917, the District Court granted a petition for rehearing, and placed the cause on the docket for hearing at Seward, Alaska. Petitioner alleges that there is nothing in the record which showed when the terms of the District Court were held in the territory of Alaska; that the original decree was entered by the court on the 12th of November, 1915, and that between the time of the rendition of the decree and the filing of the petition for rehearing the term at which the decree was entered had long since adjourned; that at the time of the entry of the order for a rehearing the time for filing a petition for rehearing had long since expired, and that the District Court was without jurisdiction.

This court issued an order that Judge Brown, as the judge of the District Court in Alaska, show cause why writ should not issue. The judge, by his return, sets forth that the complaint in Ellis v. Reed, supra, was filed in the Third division of the territory of Alaska on September 26, 1914, and the cause placed on the Seward calendar, to be heard at Seward under the rules of the court; that it was heard on the 12th of November, 1915, at Seward; that the term adjourned sine die on the 13th of November, 1915; that the findings of fact and conclusions of law and judgment were entered December 1, 1915; that thereafter time was extended to appellant, Ellis, to file and settle bill of exceptions and to perfect his appeal; that the appeal was perfected and the judgment superseded by bond approved May 27, 1916, and appeal taken; that while the appeal was pending in the Circuit Court of Appeals the term of the District Court of Alaska, Third Division, was held at Seward, Alaska, convening July 27, 1916, and adjourning sine die September 5, 1916; that the mandate reversing the judgment was issued on February 8, 1917, and filed in the District Court on June 8, 1917; that on June 13, 1917, the appellee in the case, Reed, filed motion for rehearing, and an order granting rehearing was made on July 26, and the order required the cause to be docketed and placed upon the Seward calendar for rehearing; that between the date of entry of said judgment, December 1, 1915, and the order granting the rehearing, July 26, 1917, but one term of the District Court was held at Seward, Alaska, which convened July 27, 1916, and adjourned sine die September 5, 1916, during which time the judgment was superseded and the cause was pending upon appeal in the Circuit Court of Appeals.

Otto E. Sauter and Edward Judd, both of Seattle, Wash., and Corbet & Selby, of San Francisco, Cal., for petitioner.

E. E. Ritchie, of Valdez, Alaska, for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The order of reversal in Ellis v. Reed, 238 Fed. 341, 151 C. C. A. 357, was based upon error by the District Court in ruling that the transcript of judgment in Reed v. Thompson, affirmed in 202 Fed. 870, 121 C. C. A. 228, was proof that the conveyance therein considered from Thompson to Cummings was fraudulent and binding upon the appellant in Ellis v. Reed, supra. Our expressed view was that the question whether the conveyance was fraudulent as to the creditors in Ellis v. Reed, supra, was not disposed of by prior adjudication to which certain creditors were not parties or privies; hence reversal followed. It would have been proper to have made the order a reversal with a remand to the lower court, with directions to afford appellant opportunity to offer competent evidence, if he could, to sustain the material

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allegations which the District Court, by erroneous ruling, had held were sustained. But as we acted upon the hypothesis that the term of the District Court at which the decree was made was not ended, and that appellee could move for a rehearing as indicated in Roemer v. Simon, 91 U. S. 149, 23 L. Ed. 267, we added the purpose of the remand and the practice to be pursued. It is fair to say that, had the record then before us showed on its face that the term of court at which the final decree of the District Court was rendered had ended, and that therefore there could be no motion for rehearing in the District Court, our order would not have contained such limited reference to a procedure, for we clearly intended that the reversal and the remand should be without prejudice to the appellee to make proof, if he could, by competent evidence.

We are satisfied, however, that motion for rehearing was not available. On the other hand, the order of the District Court for rehearing was evidently made with a view of complying with our mandate. This being so, why may not such order be regarded as, in effect, one merely for further examination by the District Court into the point upon which reversal was ordered? By regarding it in such light, the order may be safely treated not as granting a new hearing upon the pleadings and evidence already in the case, but rather as for a further examination of a point upon which the District Court, by advice of this court, could receive new or additional evidence. When regarded and limited in this way, the order may be one carrying out the substance of the decision of this court in the main case, and made without apparent violation of the order of this court.

In equity cases the practice of remanding for further examination is proper, and we are of opinion that it may be pursued in the present instance. Peoria Gas & Elec. Co. v. Peoria, 200 U. S. 48, 26 Sup. Ct. 214, 50 L. Ed. 365; Westinghouse Co. v. Wagner Elec. & M. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; Barber v. Coit, 118 Fed. 272, 55 C. C. A. 145. Giving to the order the limited effect indicated, we do not think prohibition should issue.

The writ is therefore denied, and the petition is dismissed, at petitioner's costs.

(258 Fed. 921)

BLANC v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 7, 1919.)

No. 3292.

1. WAR ⇐4—REGULATIONS AFFECTING CAMPS—CONSTITUTIONALITY.

The provisions of Selective Draft Act May 18, 1917, § 13 (Comp. St. 1918, Append. § 2019b), authorizing the Secretary of War to take action to prevent the keeping of houses of prostitution, etc., in the vicinity of military camps or posts, extended to naval camps by Act Oct. 6, 1917 (Comp. St. 1918, § 2813e), is not unconstitutional, as an attempt by Congress to exercise police powers within the states.

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2. INDICTMENT AND INFORMATION ⇐=4—PROPER FORM OF ACCUSATION—MISDEMEANORS.

Accusation for a misdemeanor committed against the laws of the United States may properly be by information.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Criminal prosecution by the United States against August Blanc. Judgment of conviction, and defendant brings error. Affirmed.

Frank J. Hennessy, of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., and James E. Colston, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Blanc was tried and convicted upon two informations, which were consolidated for the purpose of trial. One information charged that during September, 1918, in violation of section 13 of the act of May 18, 1917 (40 Stat. 76–83, c. 15 [Comp. St. 1918, Append. § 2019b]), entitled "An act to authorize the President to increase temporarily the military establishment of the United States," and the act of October 6, 1917 (40 Stat. 393, c. 92 [Comp. St. 1918, § 2813e]), entitled "An act to promote the efficiency of the United States Navy," approved the 6th of October, 1917, and the order of the Secretary of the Navy issued on August 3, 1918, Blanc unlawfully directed one Remegie to room 16 in a building on Broadway street in San Francisco for purposes of lewdness and prostitution, and that the said building was being used for purposes of lewdness and prostitution, and was within 10 miles of a place under naval jurisdiction, to wit, Goat Island. The other charged that Blanc, in September, 1918, in violation of the statutes mentioned in the preceding information and the above referred to order of the Secretary of the Navy, willfully and knowingly kept a house of ill fame at 773 Broadway street, in San Francisco, known as the Globe Hotel, where prostitution was carried on, and that said hotel was within 10 miles of Goat Island, a place under naval jurisdiction.

It is argued that the proof was insufficient to show that defendant kept a house of ill fame. The point is not well taken, for there was evidence tending to show that prostitution was habitually carried on in the room of the hotel kept by defendant and that defendant well knew of the fact.

It is contended that there is nothing to sustain the charge that defendant knowingly directed Remegie to the particular room described in the house referred to. But as the evidence of the government was that Remegie asked defendant about a girl, and that Blanc told him to go to a particular room, and that he would find a woman there, and that he did meet her there, and that she offered herself in prostitution, the court was right in submitting the evidence to the jury.

[1] It is said that the act of Congress of May 18, 1917, and the act

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of Congress of October 6, 1917, and the order of the Secretary of the Navy of August 3, 1918, are contrary to the provisions of section 8 of article 1 of the Constitution of the United States, in that they constitute an unlawful attempt by the United States government to exercise police powers within the state. The position is not well taken. Pappens v. United States, 252 Fed. 55, 164 C. C. A. 167; Grancourt v. United States, 258 Fed. 25, 169 C. C. A. 163.

[2] It is contended that the court should have granted a motion in arrest of judgment upon the ground that plaintiff in error had never been committed by any magistrate or indicted by a grand jury upon either of the offenses charged in the informations. The section of the act of Congress hereinbefore referred to makes one who is convicted guilty of a misdemeanor, and prescribes that he shall be punished by fine of not more than $1,000, or imprisonment for not more than 12 months, or both. Information is proper in a case of misdemeanor committed against the laws of the United States. United States v. Waller, 1 Sawy. 701, Fed. Cas. No. 16,634; United States v. Wells (D. C.) 186 Fed. 248; Mackin v. United States, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909. Section 335 of the Penal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. § 10509]) provides that—

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

By section 1022 of the Revised Statutes (Comp. St. § 1686):

"All crimes and offenses committed against the provisions of chapter seven, Title 'Crimes,' which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney."

The offense, not being punishable by imprisonment for more than a year in the penitentiary, is not an infamous crime. Parkinson v. United States, 121 U. S. 281, 7 Sup. Ct. 896, 30 L. Ed. 959; Mackin v. United States, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; In re Claasen, 140 U. S. 204, 11 Sup. Ct. 735, 35 L. Ed. 409.

We find no error and affirm the judgment.

(258 Fed. 923)

THE NORTH AMERICA. THE P. R. R. NO. 8. THE INTERSTATE.*

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

No. 222.

COLLISION ⇐95(2)—CROSSING TOWS—VIOLATION OF RULES.

One of two tugs, with tows, crossing at night in New York Bay, having a single scow in tow on a 100-fathom hawser, with the other tow on her starboard side, which crossed the course of the other without even signaling, *held* solely in fault for a collision between the tows.

Appeal from the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

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*Certiorari denied 250 U. S. 668, 40 Sup. Ct. 14, 64 L. Ed. —.

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Suit for collision by the Central Railroad Company of New Jersey against the steam tug North America, William A. Jamison, and others, claimants, with the scow P. R. R. No. 8 and the steam tug Interstate impleaded. Decree against the North America, and her claimant appeals. Affirmed.

For opinion below, see 238 Fed. 250.

Foley & Martin, of New York City (W. J. Martin, of New York City, of counsel), for libelant.

Park & Mattison, of New York City (S. Park, of New York City, of counsel), for the Interstate.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones and Dix W. Noel, both of New York City, of counsel), for the North America.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On March 4, 1915, a collision occurred between the barge Mechanic, of the tow of the steam tug Interstate, and the scow No. 8, in tow of the steam tug North America, in the upper bay below Liberty Island. As a result thereof, a libel was filed by the libelant, as owner of the Mechanic and as bailee of the cargo thereon, and on behalf of the crew, against the North America and the scow No. 8. By petition, the owner of the North America brought in the steam tug Interstate, which had the Mechanic in tow as a party defendant. The No. 8 was picked up by the North America at the anchorage ground near the Black Tom channel, for the purpose of towing her to the dumping ground off Sandy Hook. The Interstate was bound for Spuyten Dyvil creek, Harlem River, having come from Arlington, Staten Island. The tide was flood and the night was fairly clear. The Mechanic was made fast by two short hawsers and had a cargo of structural iron. The North America made fast the bridle of her hawser on the No. 8 and started in a course across the bay, paying out her hawser, proceeding under one bell until 100 fathoms or more of the hawser were thus out. She ported her wheel to proceed on her regular course down the bay between south by west and south-southwest. The North America was exhibiting her green light to the Interstate, and when first observed was substantially ahead of her, crossing her bow from port to starboard. The Interstate was on a course from the buoy off Robins' Reef Lighthouse to a point having the lights of the Cortlandt Street ferry. The Interstate kept on that course substantially, observing two white lights about two points on her port bow, moving across the channel. It was then that she first observed the tow of the North America. The Interstate starboarded her wheel immediately, changing her course three points. There was a strong flood tide, and the starboard bow of the No. 8 struck the port bow of the Mechanic, which was being towed stern first. The Mechanic filled with water and capsized. After the North America had lengthened her hawser, she put her wheel to port and proceeded ahead with a jingle bell. She did not give a signal to the Interstate, but

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kept on after the collision to the dumping grounds. The point of collision was about mid-channel off of Black Tom.

We are satisfied that the North America was solely at fault and should be held for the damages flowing from the collision. She crossed the Interstate's bow in porting her helm. The effect of this maneuver was to put the Interstate in a pocket, and this directly resulted in the collision. After the green lights of the North America were observed by the navigator of the Interstate, the course of the Interstate was changed to port, bringing her all the while nearer to the anchorage. She had a right to assume, on at first seeing the lights on the scow of the tow of the North America, that the North America would keep out of the way. The North America gave no whistle to the Interstate, and kept on down the bay without regard to the Interstate. The North America thus proceeded across the bow of the Interstate, leaving her tow behind. This was a dangerous undertaking, with the Interstate proceeding up the bay on her starboard side, and, in our opinion, constituted the fault. The tow on a long hawser was subjected to the effect of the flood tide, and this developed a pocket. It prevented the escape of the Interstate. The North America should have awaited the passing of the Interstate, or have obtained consent from the Interstate to cross her bow. We hold the North America alone at fault.

Judgment affirmed.

(258 Fed. 925)

GORDON DRY GIN CO., Limited, v. RIGHEIMER et al.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2645.

TRADE-MARKS AND TRADE-NAMES ⇐62—INFRINGEMENT OF TRADE-MARK RIGHTS.

The practice of a saloon keeper of pouring gin from one of complainant's trade-marked bottles into another and serving drinks from the latter, due to the fact that customers preferred to pour from a nearly full, rather than a nearly empty, bottle, *held* not an infringement of complainant's trade-mark rights.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Gordon Dry Gin Company, Limited, against John C. Righeimer and John C. Righeimer, a corporation. Decree for defendants, and complainant appeals. Affirmed.

George W. Tucker, for appellant.

Frank S. Righeimer, of Chicago, Ill., for appellees.

Before BAKER and ALSCHULER, Circuit Judges, and FITZHENRY, District Judge.

BAKER, Circuit Judge. Appellant, maker of Gordon gin, sold its product only in trade-marked bottles. Appellees operated a saloon

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in Chicago, and bought Gordon gin from wholesale liquor dealers. In its bill appellant charged appellees with refilling appellant's bottles with inferior gin of other makes. The master in his report recited the conflicting evidence, and found that appellant "has failed to sustain by a preponderance of evidence" the aforesaid charge. This finding, approved by the trial court, we will not disturb, because the record discloses a dispute of fact involving the weight and credibility of oral testimony.

Under an amendment of its bill appellant contends that appellees' admitted practice of pouring Gordon gin from one of appellant's trade-marked bottles into another and selling drinks across the bar from the latter bottle is an infringement of appellant's trade-mark rights. The master found that this practice was general among saloon keepers and was due to the fact that drinkers like to pour their drinks at bars from nearly full bottles rather than from nearly empty ones. There was no deception of any one. Instead of diminishing appellant's trade, the practice of acceding to drinkers' preferences would have a tendency to increase, or at least to uphold, the consumption of Gordon gin. Manifestly appellant intended that its bottles should be opened and the contents dispensed by the drink. If consumers at saloon bars will not take the last gill in a bottle, appellant's theory of its legal rights would deprive appellees of property they had bought and paid for. The mere statement of the theory carries its own refutation, we believe. Coco-Cola Co. v. Bennett, 238 Fed. 513, 151 C. C. A. 449, has no bearing, in our judgment, upon such a situation as here is presented.

The decree is affirmed.

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(258 Fed. 990)

NORFOLK BANK FOR SAVINGS & TRUSTS v. WHIPPLE.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1919.)

No. 1696.

1. COURTS ⟸372(4)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.
In cases involving construction of contracts affecting interests in real estate, even where, when the rights of the parties accrued, there was no settled law of decision in the state establishing a rule of property binding on federal courts, such courts should, unless strongly convinced of their error, follow the state decisions.

2. LOGS AND LOGGING ⟸3(11)—CONSTRUCTION—CONDITION SUBSEQUENT—CONVEYANCE OF STANDING TIMBER.
A deed to standing timber, giving the grantee 10 years from the time of commencing to cut within which to cut and remove the timber, vests in the grantee a present estate in the timber trees, with the right to begin cutting within a reasonable time from the date of the deed.

3. DEEDS ⟸145—CONSTRUCTION—COVENANT OR CONDITION.
If the language in a deed is of doubtful import, the court will construe it as a covenant, for breach of which damages may be recovered, rather than a condition working a forfeiture of the estate.

4. LOGS AND LOGGING ⟸3(14)—CONSTRUCTION—CONVEYANCE OF STANDING TIMBER.
Failure of the grantee of standing timber to begin cutting the same within 14 years *held* to terminate his estate therein, where under his deed he was required to begin cutting within a reasonable time.

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith and Henry G. Connor, Judges.

Suit in equity by the Norfolk Bank for Savings & Trusts against C. S. Whipple. Motion for injunction was denied by the District Court, and bill dismissed. Affirmed.

The opinion filed below, and here reprinted from 254 Fed. 195, was in full as follows:

CONNOR, District Judge. The bill, answer, exhibits, and testimony disclose the following case:

On January 30, 1899, H. R. Peele, being the owner of a tract of land with the timber standing and growing thereon, containing 777 acres, in consideration of the sum of $400 conveyed the timber of the dimensions named in the deed to the Cape Fear Lumber Company. The deed contains the following clause:

"The said Cape Fear Lumber Company to have ten (10) years from time they commence to cut the timber to cut and remove the same, and [if] at the end of that time they have not removed said timber, then to pay six per cent. upon the purchase price, they can have ten years longer to remove the same."

Thereafter, in August, 1904, and before the said lumber company had cut or removed any timber from said land, it conveyed to the Marion County Lumber Company all of its right, title, and interest in and to the timber, with the right to cut and remove the same, conveyed by Peele. Thereafter, on December 27, 1910, and before either of said companies had cut or removed any part of the timber, Peele con-

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veyed the land upon which the timber was standing, in consideration of $4,600, to Ansel A. Gray, who, at the time of filing the bill herein, was the owner thereof. On March 5, 1905, the Marion Lumber Company executed a deed in trust to complainant, Norfolk Bank for Savings & Trusts, conveying, among other timber rights and contracts, the timber conveyed by Peele to the Cape Fear Lumber Company, and by said company to the Marion County Lumber Company, for the purpose of securing a bond issue. On April 3, 1913, said Marion County Lumber Company executed a second deed in trust, conveying the same property, to secure an additional bond issue. There was, at the time of filing the bill, bonds secured by said deeds outstanding to the amount of $50,000.

On the 6th day of February, 1913, Ansel A. Gray instituted in the court of common pleas of Marlboro county a suit against the Marion County Lumber Company, for the purpose of removing the cloud from the title to the standing timber, alleging that, by its failure to cut and remove the timber on the land purchased by him from H. R. Peele within a reasonable time, the title had reverted to plaintiff, etc. The bill was dismissed by the circuit judge. Upon appeal to the Supreme Court the judgment was reversed, and it was adjudged that by the failure to commence to cut the timber in a reasonable time "the right to cut was ended." Gray v. Marion County Lumber Co., 102 S. C. 289, 86 S. E. 640. This decision was rendered October 15, 1915. On the 13th day of October, 1913, said Ansel A. Gray and defendant, C. S. Whipple, entered into a contract whereby Gray agreed to sell and Whipple agreed to buy the timber on the tract of land purchased from Peele, provided that in the suit brought by Gray against the Marion County Lumber Company it was adjudged that the title to the timber was in Gray. If the suit resulted adversely to Gray, the contract was to "terminate." Whipple agreed to pay $3,000 cash and execute his notes secured by mortgage on the timber for $6,000. He was to have ten years from the date of the deed to cut and remove the timber.

On November 1, 1915, upon the decision of the case by the Supreme Court, Gray executed to Whipple, pursuant to the terms of the contract, a deed for the timber, upon receipt of $6,000 cash and his notes for $3,000. Whipple began to cut the timber, whereupon complainant brought this suit. The jurisdiction of this court is based upon diversity of citizenship. All of the deeds and contracts referred to were duly recorded in Marlboro county. Defendant shows, in addition to the foregoing facts relating to the title to the timber, that the deed in trust to the complainant, trustee, includes several other lots of timber and timber contracts, the value of which is not shown; that there is outstanding $40,000 of the bonds secured by the first trust deed, and $20,000 of those secured by the second deed; that the Marion County Lumber Company has surrendered its charter and conveyed its property to the Marion County Lumber Corporation, a Virginia corporation, which has assumed the payment of the debts of the lumber company; that the officers of complainant had knowledge of the pendency of the suit by Gray against the Marion County Lumber Company, and of other suits pending in the courts of South Car-

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olina, involving the title to the timber covered by the deeds in trust, and failed to intervene therein. It appears that Gray did not have actual notice of the deeds in trust to complainant when he purchased from Peele. This is immaterial, because the deeds were recorded. He had notice of, and purchased subject to, the deed from Peele to the Cape Fear Lumber Company.

It is not seriously contended that complainant, in respect to the first deed in trust, is bound by the decree in the case of Gray v. Marion County Lumber Company. Its deed was on record, and, if plaintiff had so desired, he could, by substituted service, have brought it into the record. As to the second deed, executed after the suit was instituted, it would seem that it occupies the attitude of a purchaser pendente lite and is bound by the decree.

[1] Counsel for complainant challenge the decision of the Supreme Court of South Carolina, in the case of Gray v. Lumber Company, in respect to the extent to which it is binding upon this court, and its value as a correct adjudication of the rights of the parties claiming under the deed from Peele to the Cape Fear Lumber Company. It is conceded that the title of complainant is dependent upon the construction of that deed and the course pursued by the successors in title to the land and the timber. Counsel insist that, conceding the well-settled rule by which this court is required to follow the decision of the state courts, upon which property rights, or rules of property, are based, the remedies afforded and modes of procedure pursued in the federal courts, sitting as courts of equity, are not determined by local laws and rules of decisions, but by general principles, rules, and usages of equity having uniform operation in those courts wherever sitting. Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856. I do not understand that the decision in that case drew into question or limited the well-settled rule laid down in Burgess v. Seligman, 107 U. S. 20 (33), 2 Sup. Ct. 10, 27 L. Ed. 359, and Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, and followed in numerous other cases.

It is uniformly held that state Codes of Procedure, abolishing the distinction between actions at law and suits in equity, with the results which follow therefrom, do not limit or affect either the jurisdiction or modes of procedure of federal courts in equity causes. The primary question to be settled in this case is whether the Supreme Court of South Carolina has, by a current of decisions, so construed deeds containing substantially the same language and provisions as to make a rule of property in that state. The latest discussion of the subject and classification of the cases coming within the rule laid down in Burgess v. Seligman is found in the opinion of Mr. Justice Harlan in Kuhn v. Fairmont Coal Co., supra. The cases are cited in the opinion in Highland Park Mfg. Co. v. Steele, 232 Fed. 10, 146 C. C. A. 202.

The questions ably discussed by the learned counsel for complainant are: Should the court, in obedience to the decisions of the Supreme Court, adopt as binding upon its judgment the decision of the Supreme Court of South Carolina in Gray v. Marion County Lum-

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ber Co., not as res judicata, but as prescribing a rule of property, which the court should apply in this case? Gray v. Marion County Lumber Co., is decided upon the authority of Minshew v. Lumber Co., 98 S. C. 8, 81 S. E. 1027 (1914), in which a writ of error was dismissed for want of jurisdiction. See 235 U. S. 685, 35 Sup. Ct. 202, 59 L. Ed. 424. While the deed construed in that case is not in the exact language used in this, the court said:

"This case cannot be distinguished in any essential particular, either of law or fact, from the particular case."

After disposing of exceptions directed to the admissibility and effect to be given to parol evidence, Mr. Justice Watts says:

"Under contracts of this character, the purchaser has only the right to have a reasonable time to get the fruits of his purchase. He has no right to enjoy, by indefinite extension, what would practically amount to a perpetuity and deprive the owner of the enjoyment of his property."

The learned justice says:

"It has been decided by this court in Flagler v. Lumber Company, 89 S. C. 328, 71 S. E. 849 (1911), McClary v. Lumber Company, 90 S. C. 153, 72 S. E. 145 (1912), and Atlantic Coast Realty Company v. Litchfield, 90 S. C. 363, 73 S. E. 182 [728], that the grantee must begin the removal of the timber within a reasonable time, and it follows, as a natural, logical, and irresistible sequence that, upon the failure to commence the removal within a reasonable time, the estate or interest granted is terminated and the interest granted reverts to the grantor or his privies."

An examination of the cases cited discloses that in each of them the grant of the timber is followed by a limitation upon the time within which the grantee may cut and remove the timber, fixed by reference to the time at which it "begins cutting and removing," followed by a clause extending the time limit upon the payment of interest on the purchase price. We thus see that, from 1911 until the decision of the Gray Case (1915), the court has uniformly held that deeds conveying standing timber, coupled with the language found in the deed from Peele to the Cape Fear Lumber Company, conveyed to the grantee a determinable or qualified fee to the timber which determined upon the expiration of the period fixed by reference to the time the grantee began to cut and remove the timber. It will be observed that, in the cases cited, the construction of the language was essential to a decision of the case. In each case it was strenuously insisted that the timber was conveyed in fee, and that, by the failure to cut and remove within the time limit, the title did not revest in the grantor. It is in evidence in this case that learned counsel so advised the complainant. Such has been, at all times, in South Carolina and other states, the contention of counsel representing the timber companies.

In Rogers v. Marion County Lumber Corporation (S. C.) 93 S. E. 1055, the court in a per curiam opinion treats the question as closed —the law settled. The decisions of the Supreme Court of South Carolina place the question clearly within the rule of stare decisis. Complainant insists that the law was not so settled at the date upon

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which its right accrued. In Kuhn v. Fairmont Coal Co., supra, it is said:

"Where, before the rights of the parties accrued, certain rules relating to real estate have been so established * * * as to become rules of property and action in the state, those rules are accepted * * * as authoritative declarations of the law of the state."

This limitation, in respect to the time at which the "rights of the parties accrued," as related to the time when the "rule of property" was "established," invites recurrence to the dates of the deeds and the South Carolina decisions. The deed from Peele to the Cape Fear Lumber Company bears date January 30, 1899. Accepting the South Carolina rule as to the reasonable time within which the grantee, or its assigns, should begin to cut at approximately 12 years, the right of complainant to demand the extension of time accrued in 1911. Gray did not bring his action against the Marion County Lumber Company until February 6, 1913. While defendant entered into an executory contract with Gray for the purchase of the timber, he did not acquire such title as Gray had, and pay the purchase price, until November 1, 1915, subsequent to the decision by the Supreme Court holding that complainant's title to the timber had determined at the date when the suit was brought, January 27, 1913.

In the Flagler Case, decided in 1911, it is said that the question presented, the construction of a timber deed containing language from which the court found that the parties intended to place a time limit to the right to cut and remove the timber, had not theretofore been before the court. It was there distinctly held that when such intention was expressed in the deed, or could be reasonably inferred, the grantee did not take an absolute fee, but that he was bound to commence the removal of the timber within a reasonable time. Judge Rucker, after reviewing the cases relied upon by defendant to sustain its contention, and decided cases in other courts, thus states the conclusion:

"Suffice it to say that we are of opinion that, both by the inherent reason of the thing, as well as by authority, the true rule is that, wherever it is apparent in a contract that the parties had in view some time for the commencement of the removal of the timber, which intent was not embodied in the * * * contract, the law will presume, and will enforce, that such commencement of the removal of the timber shall be within a reasonable time from the date of the contract."

The court reversed the decree of the trial court dismissing the bill, and remanded the case, with direction to the court to take testimony and ascertain what would be a reasonable time. The language of the extension clause in the deed before the court was, in all essential respects, the same as in this. The grantee was given 10 years from the time when it began cutting and removing, with the right to an extension upon payment of interest. The deed bore date June 10, 1899. Every subsequent decision has been consistent with that made in the Flagler Case. It will be observed that the court did not hold that the time elapsing between the date of the deed and the decision was unreasonable. It left the question open for determination of the trial court, upon testimony, as a question of fact.

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Conceding, for the present, that at the time the right of complainant to tender the interest and demand the additional time accrued the decisions of the South Carolina court had not established a rule of property applicable to complainant's deed, and that the decisions thereafter made are not to be "accepted as authoritative declarations of the law," the question is presented whether the case falls within the other classifications made by Judge Harlan, in which he says:

"It is not only the right, but the duty, of the federal court to exercise its own judgment, as when the case depends upon the principles of general jurisprudence. * * * For the sake of comity, and to avoid confusion, the federal courts should always lean to an agreement with the state court, if the question is balanced with doubt."

It is suggested that, while the timber deed conveyed real property situate in South Carolina, and in so far as the kind and quality of estate is conveyed the decisions of the court of that state are rules of property, the question presented here involves the construction of a superadded contract prescribing the terms upon which a valuable right may be enjoyed, which should be construed by this court upon principles of general jurisprudence—the intention of the parties. The distinction is stated in Kuhn v. Fairmont Coal Co., supra, and a number of illustrative cases commented upon. The learned justice says:

"There are adjudged cases involving the meaning of written contracts having more or less connection with land that were not regarded as involving a rule in the law of real estate, but as only presenting questions of general law, touching which the federal courts have always exercised their own judgment, and in respect to which they are not bound to accept the views of the state courts."

The opinion, and the dissenting opinion of Mr. Justice Holmes, contain an interesting and exhaustive discussion of the question in the light of the decided cases. Certainly, for the reasons strongly stated by Judge Dayton in Kuhn v. Fairmont Coal Co. (C. C.) 152 Fed. 1013, the federal courts should, unless strongly convinced of their error, follow the decisions of the state courts upon the questions presented, and upon the decisions of which the rights of the parties depend.

[2] In his opinion the learned District Judge has made a full and valuable collection of illustrative cases. This view of the case opens up for examination the very interesting questions presented and argued with marked ability by counsel for complainant. They challenge the decision of Gray v. Lumber Co., supra, and the cases upon which it is based. To state the contention in the language of the brief:

"A present estate in the timber vested in the Cape Fear Lumber Company, immediately on the execution of the deed from H. R. Peele, which has passed by mesne conveyances to the plaintiff, by virtue of the deed in trust."

This may be conceded. The best considered authorities so hold. From this proposition it is argued that such estate is not one which is determinable by operation of law for failure of the grantee, or its assigns, to commence the cutting and removal of the timber within a reasonable, or any other, time.

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An examination of the opinions of courts, dealing with timber deeds, containing limitations upon the time for cutting and removing, discloses a purpose to give to them a construction, effectuating what the court finds to have been the intention of the parties, and to conserve the rights of both parties resort to analogies, sometimes resulting in confusion. The early cases in states wherein the cutting of timber was conducted by corporations operating large mills, buying standing trees from the owners of the land, either with or without a provision fixing the time within which they were to be cut and removed, disclose different views and variant constructions. By some it is held that no title vests in the trees until they are cut, and that therefore only such as are cut and removed within the time fixed pass to the grantee. Strasson v. Montgomery, 32 Wis. 52. It is said:

"Such deed does not immediately pass the title to the trees, and is not a sale, or a contract for a sale or interest in land, but an executory contract for a sale of chattels, to take effect when the trees are cut and severed from the land, with a license to enter and cut during the time fixed." Fletcher v. Livingston, 153 Mass. 388, 26 N. E. 1001.

By other courts it is held that, upon failure to cut within the time limited by the deed, the title to the standing trees, or such of them as remained uncut, does not revert to the owner of the land, but remains in the grantee of the trees; that the failure to cut within the time limit did not work a forfeiture of the estate; that the license to enter and cut expired at the end of the time fixed. This construction left the owner of the trees in the position of having title to timber trees standing and growing on the lands of the grantor, with no right to enter and cut them. It was said that in such cases, by entering upon the land, the owner of the trees committed an actionable trespass; the damage recoverable was the injury to the soil, in making the entry—not the value of the trees cut and removed.

The conclusion to which other courts came was that the title to the timber vested in the grantee, with the condition annexed that if it was not cut and removed within the period fixed by the deed, or, if no time was fixed, within a reasonable time, the title to the timber not cut and removed reverted to the owner of the land or his grantee. The Supreme Court of Michigan, in Williams v. Flood, 63 Mich. 493, 30 N. W. 96, said:

"It is not very important to discuss the exact nature of plaintiff's rights under the written contract. Whatever they were, they included an absolute sale of all the timber described, subject only to such qualifications of the right of removal as the contract mentions. At most, this condition would only operate by way of forfeiture. The timber had all been paid for, and all belonged to plaintiff, unless lost by that forfeiture for nonremoval."

In Bunch v. Elizabeth City Lumber Co., 134 N. C. 121, 46 S. E. 24, the question in respect to the construction of a timber deed, with a clause limiting the time for cutting computed from the time the grantee began to cut, was first presented to the Supreme Court of North Carolina. It was argued on petition for rehearing, by eminent and learned counsel. Mr. Justice Walker reviewed the authorities, reaching the conclusion that the deed vested a present title to the timber in

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the grantee; that the right to cut and remove was limited to a reasonable time; that, upon the failure to begin to cut within such time, the title reverted to the grantor. This decision was rendered in 1903. He says:

"It is well settled on principle and by authority that the legal effect of the instrument is that the vendor thereby conveyed to the vendee all of the trees and timber on the premises which the vendee should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to the vendor or to his grantee of the premises."

In Midyette v. Grubbs, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278 (1907), Mr. Justice Hoke reviews the decided cases and says:

"It may now be taken as settled that growing trees are a part of the realty, and a contract to sell and convey them, * * * must be reduced to writing. These authorities also clearly establish that, on the expiration of the time stated in such a contract within which the timber may be removed, all right in the vendee shall cease and determine, and the estate in so much of the standing timber as has not by that time been severed shall revert to the vendor; and both positions are upheld in numerous and well-considered cases in other jurisdictions."

See Hawkins v. Lumber Co., 139 N. C. 162, 51 S. E. 852; Lumber Co. v. Corey, 140 N. C. 467, 53 S. E. 300; Hornthal v. Howcott, 154 N. C. 228, 70 S. E. 171; Jenkins v. Lumber Co., 154 N. C. 357, 70 S. E. 633.

In a very able and well-considered opinion by Judge Keith, in Wright-Young v. Camp. Mfg. Co., 110 Va. 678, 66 S. E. 843 (1910), after a thorough examination of the decided cases, the court adopted the opinion of those courts which held that the deed conveyed an estate in the timber, subject to be divested, and revert to the grantor, upon failure to cut and remove within the time fixed in the deed, or a reasonable time. He thus concludes the discussion:

"Looking to the whole deed, and all of its provisions must be considered in order to arrive at its proper construction, we are of opinion that it was not the intention of the parties to give an absolute and unconditional title to the timber, but only such as was cut and removed within the time limited by the deed, and such extensions thereof as the grantee was entitled to demand upon a fair construction of the deed, or as might be agreed upon between the parties."

In that case the deed was executed January 24, 1895, with a limit of five years to cut and remove the timber, and the right to demand an extension "as long as the grantee might desire," upon payment of interest on the purchase price. At the end of five years the grantee paid the interest, and continued to do so for four years, when the grantor refused to accept further interest and sold to another person, who began to cut the timber. The lumber company brought suit to enjoin the cutting. Although the contract gave the grantee the right to demand an extension of time "as long as it might desire," such right was construed to mean "a reasonable time." Quoting with approval the language used in McIntyre v. Barnard, 1 Sandf. Ch. (N. Y.) 52, the learned president said:

"It is only by this construction that we can give full scope to the whole intention expressed by the instrument; and at the same time we relieve it

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from the irrational consequences to which the defendant's construction inevitably leads."

The effect which would follow from the contention that these deeds impose permanent burdens upon timber lands, and prevent the owner from bringing them under cultivation or other use to which they are adapted, does violence to the intention of the parties, and imposes such burdens upon the lands of the grantors as greatly to diminish, if not destroy, its value.

The court, in that case, noting that nine years had elapsed since the execution of the deed, gave the lumber company one year within which to cut, from the filing of the decree. This case was cited with approval by the same learned judge in Brown v. Surry Lumber Co., 113 Va. 503, 75 S. E. 84. There were, in that case, facts which differentiated it from the Wright-Young Case, but the court adhered to the construction of the deed announced in the first case. Quigley Furniture Co. v. Rhea, 114 Va. 271, 76 S. E. 330.

In Smith v. Ramsey, 116 Va. 530, 82 S. E. 189, Judge Buchanan refers to the great "diversity of judicial decision" in the construction of timber contracts, not only in different jurisdictions, "but the decisions of the same court have not always been uniform." He discusses the "vexed question," citing the Wright-Young and the Rhea Cases, supra. He concludes:

"Those decisions would seem, therefore, to settle, if decisions can settle a question, that the provisions in such contracts for the cutting and removal of the timber within a fixed period are not covenants, but conditions."

In Adkins v. Huff, 58 W. Va. 646, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246, Huff conveyed to Adkins a tract of land, reserving and excepting the timber, giving 34 months from the date of the deed to cut and remove the timber. Eliminating conditions which came into the situation after the date of the deed, the grantor not having cut and removed the timber within the period fixed, the grantee, claiming that the title to the timber became absolute in him, began to cut. The grantor, claiming under the reservation, applied to the court for an injunction, which was granted. Upon appeal the decree was reversed and the bill dismissed. Judge Poffenbarger said:

"The authorities are practically uniform in holding that an instrument granting standing timber, and containing a clause requiring or permitting it to be removed within a specified time from the date of the grant, gives no absolute and unconditional title to the property. Some courts hold the right of the grantee to be a license, others a lease, and others a defeasible title to the timber. By the great weight of authority it is determined that no right or title exists in the grantee after the expiration of the time specified in the deed or contract."

In support of this conclusion a large number of cases from the courts of Vermont, Michigan, New York, Minnesota, Massachusetts, Wisconsin, Ohio, and Maine are cited. Holding that the same construction should be given a reservation as a conveyance of timber with a time fixed for cutting, the court enjoined the grantor claiming under the reservation from cutting after the expiration of the time limit. The judge said obiter that if no time for cutting was fixed,

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and the deed contained apt words to convey a fee, the title was "absolute and unconditional," citing cases from Alabama and Michigan.

In Keystone Lumber & Mining Co. v. Brooks, 65 W. Va. 512, 64 S. E. 614, Judge Brannon cites Adkins v. Huff, supra, but appears to reject the conclusion reached. He does not overrule it, but, with all deference to the learned judge, I am unable to reconcile much that he writes, or his conclusion, with the decision in that case. It may be that the two decisions may be reconciled by noting the construction placed on the language of the two deeds. The inference which I draw from the opinion is that the learned judge leaned to the view that the language used in timber deeds fixing a time within which the timber was to be removed is to be construed as a covenant on the part of the grantee, and not a limitation or condition subsequent. The argument of counsel for complainant in this case finds much support in Judge Brannon's opinion.

It is held by Judge Rose in Cullen v. Armstrong (D. C.) 209 Fed. 704, that according to the decision of the Maryland court a contract for the sale of standing timber, or, as he describes it, a "timber leave," is personal property; it is bought and sold as goods, wares, and merchandise.

I have, at probably unnecessary length, reviewed the decisions in the state courts in this circuit, because of my very high regard for the learning of the justices, and a careful consideration which they have given to the construction of these timber deeds, and for the additional reason that I deem it important that the decisions of the state and federal courts in this circuit shall be uniform.

If the time at which the rights of the lumber companies, purchasing timber and operating large mills in these states, be fixed at the date of the deeds, between the years 1895 and 1905, approximately, rather than at the dates at which the right to demand extension of time for cutting and removing—1905 to 1915, approximately—it will be found that in neither of the states had there been such a number of cases decided as to constitute authoritative declarations of the law controlling the federal courts. If the date of the deeds be adopted as the time when the right of the parties accrued, the question presented in this and other cases coming before the District Courts in this district must be treated as open to the independent judgment of the federal court, observing the principle announced in Kuhn v. Fairmont Coal Co., supra.

[3] In the very carefully prepared brief of counsel for complainant it is contended that the courts of South Carolina, and therefore Virginia and North Carolina, have fallen into error in holding that the clause fixing the time within which the timber shall be cut and removed is a condition subsequent, and that failure to comply with such provision works a forfeiture of the estate in the timber; that such language should be construed to be a personal covenant on the part of the purchaser to cut and remove the timber within the time prescribed. It is well settled that, if language is of doubtful import, the court will construe it to be a covenant, for breach of which damages may be recovered, rather than a condition working a forfeiture

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of the estate. King v. N. W. R. R. Co., 99 Va. 625, 39 S. E. 701; Bangert v. Roper Lumber Co., 169 N. C. 628, 86 S. E. 517. In the last-cited case, in which there were two dissents, the court held that, under the terms of the deed, payment was not required in advance. The further contention is made that, if the provision be construed as attaching to the estate a condition subsequent, the failure to comply with its terms does not work a forfeiture until action is taken by the party entitled to take advantage of the breach, as by re-entry, notice, or otherwise—that failure to do so operates as a waiver of the breach; that a court of equity will not lend its aid to enforce a forfeiture of a condition subsequent. Authorities are cited sustaining these positions.

Language is used by some of the courts indicating that they treated the clause limiting the time for cutting the timber as creating a condition subsequent. It would seem, however, that the better interpretation of the opinions leads to the conclusion that they likened the deeds, and the estate conveyed to a base or qualified fee. Bunch v. Lumber Co., supra. This estate is defined by Blackstone as:

"Such a one as has a qualification subjoined thereto and which must be determined whenever the qualification annexed to it is at an end." 2 Com. 147 (*109).

In the note to Jones' Blackstone, the case of Wiggins Ferry Co. v. Ohio & M. Ry. Co., 94 Ill. 83, is cited. It is said of this character of estate:

"It is true the estate here may not endure forever; it may be determined by the failure to use and employ the rights and easements granted in the manner prescribed in the grant; but if they shall be so used and employed the grant is forever. And this seems to meet Blackstone's definition of a qualified or base fee."

It is also said that the estate created by the conveyance is not properly an estate on condition, either precedent or subsequent, but a base or qualified fee. Kilpatrick v. Graves, 51 Miss. 432.

Chancellor Kent defines a qualified base or determinable fee as:

"An interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event circumscribing its continuance or extent." Com. IV, *9.

Mr. Justice Walker states the proposition clearly, saying:

"In no event should we give a construction to the instrument which will confer any greater right or estate than is commensurate with the object and purpose of the parties, as expressed in it." Jenkins v. Lumber Co., supra.

It is manifest that these "timber contracts" are sui generis, and in the effort to construe them by analogy to deeds, or instruments conveying land, difficulties are encountered. The courts which adopt the view of the South Carolina court, that an estate vests in the grantee upon the delivery of the deed, with a limitation upon the time for cutting and removing, hold that upon the expiration of such time the title "determines," "reverts," or use equivalent terms, excluding the idea that the clause fixing the time creates a condition subsequent.

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I have given to the well-considered argument of counsel careful consideration. They are confronted, however, with the fact that the Supreme Court of South Carolina, in accord with the large majority of other state courts, especially in this judicial circuit, has, by an unbroken line of decisions, held that the title to the timber of the Cape Fear Lumber Company, and its assignee, determined upon the failure to cut and remove within a reasonable time, and that such time had elapsed before Gray brought his suit against the Marion County Lumber Company, or it made a tender of the interest and gave notice of the additional time required. This court is asked to disregard the decision of the South Carolina court, and hold that complainant is the owner of the timber under the deeds in trust executed by the Marion County Lumber Company, and that defendant, purchasing from the owner of the land subsequent to the decision of the Gray Case, be enjoined from cutting. To so hold would do violence to the wise and salutary rule prescribed by the Supreme Court of the United States in Kuhn v. Fairmont Coal Co., supra, that—

"To avoid confusion, the federal court should always lean to an agreement with the state court, if the question is balanced with doubt."

The wisdom of this rule followed by the federal courts is illustrated by the situation presented in this case, and other timber contracts, or deeds, of the same character. It appears from the state reports that parties and corporations holding deeds for timber on extensive tracts of land, in the South Atlantic states, containing clauses limiting the time for cutting, differing in some respects, but substantially similar, have strongly pressed upon the state courts the contention made here. The opinions of the judges in the cases cited, and many others, disclose a careful, anxious effort to give to the deeds a fair, reasonable construction. As said by Judge Keith, "looking to the whole deed, and all of its provisions," and "avoiding irrational consequences," they have reached the conclusion that—

"It was not the intention of the parties to give an absolute and unconditional title to the timber, but only such as was cut * * * within the time limited by the deed, and such extensions thereof as the grantee was entitled to demand upon a fair construction of the deed, or as might be agreed upon between the parties."

While I am not inadvertent to the fact that other courts have held to the contrary, I concur in this construction.

It is urged that in Crown Orchard Co. v. Dennis, 229 Fed. 652, 144 C. C. A. 62, the Court of Appeals of this circuit rejected the construction placed upon the timber deeds by the South Carolina court in the Flagler and Minshew Cases, and adopted, as its independent judgment, the rule laid down in the Prettyman Case, 97 S. C. 247, 81 S. E. 484, resulting in the conclusion that, when the extension clause gave such additional time as the grantee "might desire," the doctrine of reasonable time could not be applied; that the right to cut and remove was unlimited. It will be noted that in the Prettyman Case the circuit judge of the state court, in his decree, said that when such time was granted as the grantee "might desire," in "unambiguous and express terms," the "reasonable time" rule did not apply; that "when

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the parties speak for themselves the court cannot imply." The learned judge fixed the additional time to cut at 10 years, because "that was the time demanded by the grantee." He says: "The plaintiff had thus, by its notice, fixed the duration of the extension." A reasonable construction of the language of the circuit judge justifies the argument that he was of the opinion that the language of the deed excluded the application of the "reasonable time" rule. The Chief Justice in a per curiam opinion says that, "for the reasons therein set forth, the judgment is affirmed." Judge Watts, in his dissenting opinion, suggests that, by adopting the decree "as the judgment of this court," it was committed "to a decision and a policy that will be far-reaching in its effect and prejudge other cases of similar character." This case was strongly pressed upon the federal court in the argument of the Crown Orchard Case. Judge Knapp says:

"It is not necessary for us to affirm that the Prettyman Case established a rule of property in South Carolina which we are bound to apply. We follow it upon the question in dispute, not merely out of deference to the court which decided it, but because the decision commends itself to our judgment as just and correct."

From this language it is argued in this, and other, cases that this court is bound, as by an authoritative declaration of the law, to hold that the Cape Fear Lumber Company and complainant, its assignee, is entitled to an unlimited and unlimitable time to cut and remove the timber. The language quoted, without limitation, is capable of that construction. It may be suggested that, in saying that the judgment in the Prettyman Case was "for the reasons given" affirmed, the Chief Justice was referring to the fact that the period of 10 years was fixed because, as stated by the circuit judge, that was the time fixed by the plaintiff, thus limiting the scope of the per curiam opinion of the court. However this may be, it is manifest that the learned judge in his opinion in the Crown Orchard Case did not intend to hold that the deed conferred an unlimited time to cut. He says that the exercise of the right conferred by the deed "must be an honest and justifiable desire, not a pretended or fantastic desire. In short, we take the phrase to mean such additional time as may be reasonably desired by the party having the right to an extension." The court remanded the case, with direction to the court below to fix the time, etc.

Referring to the Prettyman Case, supra, it is worthy of note that the decision was rendered on April 23, 1917, and the decision in the Minshew Case on April 27, 1917. Judge Watts, who wrote in the Minshew Case, makes no reference to the decision in the other case, although he reviews all of the other decisions of the court relating to the construction of timber deeds. There were differentiating facts in the cases. As we have seen, the Minshew Case is cited as the authoritative declaration of the law in the Gray Case.

I have given to the language used by the court in the Crown Orchard Case careful consideration, and said this much to exclude the suggestion that I did not regard it as controlling authority in like cases. I shall indulge the hope that my decree in this may be reviewed, so that, without regard to the conclusion reached, the District Judges in this

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circuit, and the parties who have large interests involved in such contracts, may be advised what construction the federal courts will place upon these deeds.

[4] I conclude that the deed from Peele to the Cape Fear Lumber Company vested in the grantee a present estate in the timber trees, with the right to begin cutting and removing them within a reasonable time computed from the date of the deed; that, upon failure to begin cutting within such time, the title to, and estate in, the timber determined and reverted to the owner of the land or his grantee, Gray; that, by the failure to begin cutting the timber within the time elapsing between the date of the deed and the institution of the suit by Gray against the Marion County Lumber Company—14 years—the right, title, and estate to the timber vested in the lumber company, and such rights as vested in complainant by virtue of the deeds in trust determined and reverted to Gray, the owner of the land; that by the deed from Gray to defendant he became the owner of the timber, with the right to cut and remove it, according to the terms and provisions of the deed under which he claims.

This construction of the deed disposes of several interesting questions discussed by counsel, upon the theory that defendant's title was dependent upon a forfeiture wrought by breach of a condition subsequent. It also renders unnecessary the discussion of questions presented by defendant.

The motion for an injunction is denied, and the bill dismissed, at the cost of complainant.

E. P. Buford, of Lawrenceville, Va., and T. D. Savage, of Norfolk, Va. (B. A. Hagood, of Charleston, S. C., on the brief), for appellant.

A. F. Woods and L. D. Lide, both of Marion, S. C. (T. I. Rogers, of Bennettsville, S. C., on the brief), for appellee.

Before PRITCHARD and KNAPP, Circuit Judges, and WADDILL, District Judge.

PER CURIAM. We are satisfied after careful examination with the decision of this case by the court below and with the reasons assigned therefor by the learned District Judge. The decree is accordingly affirmed on his opinion. Affirmed.

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(258 Fed. 989)

COMBINED LOCKS PAPER CO. v. PUSEY & JONES CO.

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919.)

No. 2663.

1. DAMAGES ⟸23—BREACH OF CONTRACT BY SELLER—LOST PROFITS.
In an action for the price of a machine built by plaintiff for defendant, a counterclaim for lost profits because of delay in delivery of the machine cannot be maintained, unless special circumstances are shown with respect to which the parties must be deemed to have contracted.

2. DAMAGES ⟸40(4)—BREACH OF CONTRACT BY SELLER—DAMAGES—LOST PROFITS.
The purchaser of a paper-making machine cannot set up, as a special circumstance entitling it to recover lost profits because of delay in delivery of the machine, a contract made by it for delivery of paper during five years, where by its terms it reserved the right to begin delivery at a date later than the actual installation of the machine.

In Error to the District Court of the United States for the Eastern District of Wisconsin.

Action at law by the Pusey & Jones Company against the Combined Locks Paper Company for a balance due under a contract. Judgment for plaintiff, and defendant brings error. Affirmed.

The opinion filed below, on denial of motion by defendant for new trial, and here reprinted from 255 Fed. 700, was in full as follows:

GEIGER, District Judge. The complaint contains two causes of action, the first based upon a contract dated on or about May 15, 1916, whereby the plaintiff undertook to make for the defendant a paper machine for the agreed price of $120,000, according to the terms and specifications prescribed, and that the defendant, the plaintiff having furnished the machine, is indebted to the plaintiff in the sum of $31,215.19, with interest from March 1, 1917, as an unpaid balance of the agreed purchase price. The statement of the second cause of action recites the written undertaking on the part of the plaintiff, dated on or about July 26, 1916, to rebuild for the defendant a described paper machine in consideration of the payment of $23,750; that the plaintiff performed such contract, but defendant has defaulted upon an unpaid balance of the contract price, $4,890. On both causes of action judgment in the aggregate of $36,105.19 is asked.

The prima facie character of the plaintiff's demand was substantially admitted by the defendant upon the trial of the case, whereupon the

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issues for trial were those tendered by the answer which set up counterclaims in substance:

That with respect to the first cause of action the plaintiff—

"failed to fulfill said contract by not delivering the machine therein mentioned on the 15th day of November as the contract provided, until the 3d day of April, 1917, when it was delivered to the carrier in uncompleted shape; that by reason of said delay, and the failure of the plaintiff to deliver the said machine in the time provided in said contract, and the resulting inability of the defendant to make use of said machine during the period of delay caused by the plaintiff in noncompliance with said contract, the defendant suffered great damages, namely, in the amount of thirty-four thousand four hundred ten dollars and seventy cents ($34,410.70), which damages were the direct result and entirely caused by the failure of the plaintiff to fulfill said contract as it, the plaintiff, was obligated to do, and that all of his damages necessarily resulted from default, negligence, and violation of this contract by the plaintiff."

In respect of the second cause of action the defendant alleged that the machine to be repaired was to be so repaired and delivered to transportation lines at Fitchburg, Mass., on November 1, 1916; but—

"that the plaintiff delayed the delivery of said repaired machine as provided in said contract until the 20th day of February, 1917; that by reason of said delay and the resulting deprivation of the use of said machine by the defendant, the defendant suffered great damages and losses, namely, the sum of eight thousand four hundred dollars ($8,400), all of which damages and losses were directly caused by the direct and necessary result of said plaintiff's delay in the fulfillment of said contract."

A further set-off and counterclaim, based upon alleged expenditures made by the defendant on account of supplying missing parts from the machine, traveling expenses, and the like, in the sum of $1,733.85 is offered, and the answer demands judgment for a dismissal of the complaint, and for judgment in the sum of $16,544.55, being, I assume, the excess of the damages set out in the counterclaim beyond the sum which by the answer is admitted to be due to the plaintiff.

Upon the trial of the case the defendant undertook to establish its counterclaim by evidence, most of which was tentatively received, subject to objection, but practically all of which was subsequently stricken out, whereupon a verdict was directed in favor of the plaintiff and against the defendant, and a motion for a new trial, which has been argued, presents for review the various rulings of the court upon the rejection of evidence, which led to granting the motion for a direction of verdict and a dismissal of the counterclaim.

A consideration of the motion must be addressed, first, to the general contentions of the defendant respecting the rule of recovery upon contracts such as are involved in the case, and, secondly, a consideration of the facts tendered in evidence with a view of determining whether, in any aspect, they furnish a basis for an award of damages by the jury upon the theory and the only theory offered and insisted upon by the plaintiff.

It will be observed from the pleadings that the defendant framed the counterclaims, excepting the last, solely upon the hypothesis of seeking recovery under a general rule of damages. There is no inti-

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mation in the pleading, except as noted, of any claim of recovery, except the general damages sustained by the defendant through a deprivation of the use of the machine during the delay period; and this brings us at once to a consideration of the bill of particulars demanded by the plaintiff of the defendant prior to the commencement of the trial. It is as follows:

Per ton profit 22½-pound paper made on 176-inch machine, contract No. 1331		$9.78
Daily tonnage produce		30
Delay on shipment, December 1, 1916, to April 3, 1917		110 days
110 days x 30 tons		3,300 tons
3,300 tons x $9.78	$32,274.00	
Payments to Valley Iron Works, Appleton, Wis., for material to replace imperfect or unfinished parts called for in purchase contract	327.30	
Cash advanced to Pusey & Jones Company	50.00	
Total	$32,651.30	
Contract No. 1340 would have increased production from November 1 to February 20		281.7 tons
Profit on increased production	$8,119.26	
Expense L. L. Alsted to Wilmington, Del., January 13, 1917	187.48	
Service and expense Pittsburg testing laboratory at Wilmington and Pittsburg	1,292.26	
Express charges on delayed material covered by contract	254.11	
	$9,853.11	
Interest on money actually expended on contracts 1331 and 1340 and on plant and equipment from date when delivery should have been made to delivery when same was actually made		$7,500.00

In explanation of references in this bill, it may be said that the first items, under "Contract No. 1331," are pertinent to the first cause of action of the complaint and to the counterclaim averring a breach through a delay of furnishing the new machine, and that the second items, under "Contract No. 1340," are pertinent to the second cause of action of the complaint and to the counterclaim for damages for delay in repairing and shipping the old machine; whereas the last item is evidently intended to speak for itself as an interest item on purchase-money expenditures, and "on plant and equipment from date when delivery should have been made to date when delivery actually was made."

[1] It may be noted at this time that even in the bill of particulars the defendant is silent respecting a claim for profits based upon "special circumstances" subsequently sought to be introduced in evidence on the trial. This will be seen to be of importance, unless the court was wholly in error in rejecting the notion that profits as profits are recoverable only upon the basis of some special circumstances with respect to which the parties must be deemed to have contracted. Obviously, it is immaterial if, as defendant's counsel contends, profits are always recoverable as profits—as anticipated gains—in any action for breach of contract. This observation should be borne in mind in a consideration of the evidence respecting the defendant's dealings

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with third persons pertaining to its paper output on the basis of its new installation and remodeled paper plant.

Giving to the defendant's evidence of oral communications by its officers to officers or agents of the plaintiff, prior to the execution of the written contracts in suit, the most favorable view, it is in brief:

That, approximately six weeks or two months before the contracts were signed, its president inquired of plaintiff concerning the latter's ability to make a paper machine, whereupon an interview was had in which the former disclosed to agents of the latter, in a general way, its interest in a new machine, contingent, however, upon further consideration of the matter of building a new, or remodeling its old, plant, and in a like general way the broad contingency of first ascertaining the likelihood or certainty of disposition or sale of its manufactured product. Evidently defendant's consideration of these matters—which, of course, was for itself—reached such a state of certainty that a further interview, or possibly two, which, in point of time, immediately preceded actual execution of the contracts, were had. Aside from negotiation pertaining to price, mechanical and structural detail of machine, the defendant's witnesses claim that at this latter interview or interviews there was communicated to the plaintiff's agents the fact that they now had contracts for the sale or disposition of the output of the proposed new machine; that such contract or contracts were referred to as the Sears-Roebuck contracts, or that the paper to be manufactured was for Sears, Roebuck & Co.; and one witness stated that he told plaintiff's agents such contract was to run for five years from January 1, 1917. The machine was intended to be used for making catalogue paper.

This testimony contained the first intimation in the case that defendant claimed the existence of specific contracts with third persons, knowledge whereof was communicated to the plaintiff as specific circumstances with reference to which the parties contracted, and as a result whereof the defendant, because of the breach, was entitled to recover as special damages the specific profit which could have been realized upon the sale of paper possible to have been manufactured during the delay period of the delivery of the machines; and the plaintiff objected to the reception of this testimony upon the specific ground that the pleadings, including the bill of particulars, did not justify its admission. The defendant, while suggesting its desire to amend, if its pleadings were not broad enough, did not in fact make an application to enlarge its pleadings. The court intimated that the objection interposed by the plaintiff seemed pretty good; but, it is believed that other considerations hereinafter presented dispense with the necessity of dealing with the merit of this specific objection.

[2] The defendant, in further effort to prove its damages, thereupon offered certain contracts, which in fact constituted the "special circumstances upon" which it sought recovery of profits. These will be considered:

First, a contract between the defendant and Bermingham & Seaman Company, of Chicago, whereby the defendant undertook to manufacture and deliver paper covered by the former's "contracts with

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Sears, Roebuck & Co. as shown by copies, samples and blue prints, which are annexed hereto, to all the terms and conditions of which we hereby agree," viz.:

1—Contract dated April 11, 1916, for output of Little Chute mill, or its substitute plant, approximately 45,000 tons white catalogue paper.
2—Contract dated April 17, 1916, for approximately 15,000 tons white catalogue paper.
3—Contract order No. 4365, dated May 1, 1916, for approximately 2,500 tons yellow index paper, etc.
4—Contract order No. 4363, dated May 1, 1916, approximately 10,000 tons white catalogue paper.
5—Contract order No. 4364, dated May 1, 1916, 10,500 tons white catalogue paper.

Such contract contains further details respecting price and the adoption of the Sears-Roebuck contracts as prescribing terms of payment.

It thus appears that the defendant claims to have undertaken for Bermingham & Seaman Company the manufacture and delivery of paper claimed to have been contracted by the latter for manufacture and delivery to Sears, Roebuck & Co.

Secondly, in view of the fact that the defendant expressly adopted them, the terms of the two contracts—there being three so-called order contracts, presumably given under the principal contracts—are important as evidencing the obligations in fact assumed by Bermingham & Seaman Company toward Sears, Roebuck & Co. One of the contracts, dated April 11, 1916 (in evidence as Exhibit 5), and under which I believe the three so-called "order contracts" were given, contains, among others, the following provisions:

"We propose to furnish you the entire output of 22½-pound No. 1 white catalogue paper of the Little Chute division of the Combined Locks Paper Company, located at Little Chute, Wis., subject to the following specifications and conditions:

"(1) Duration of contract to be five years from January 1, 1917, providing we succeed in erecting plant and have the same running by that time or five years from actual date the plant starts operation, which will be not later than June 1, 1917.

"(2) Approximate annual quantity, 9,000 tons."

The second contract appears to be dated April 17, 1916, and contains the following proposal by Bermingham & Seaman to Sears, Roebuck & Co.:

"We propose to furnish you a part of the output of 22½-pound No. 1 white catalogue paper of the Combined Locks Paper Company, located at Combined Locks, Wis., subject to the following specifications and conditions:

"(1) Duration of contract to be five years from January 1, 1917.

"(2) Approximate annual quantity, 3,000 tons."

It will suffice to refer to the contracts entered into between the defendant and the plaintiff for the manufacture and repair of the machines, by noting merely their provisions respecting date of delivery—that for the manufacture and sale of the new machine being given as during the month of November, and that for the repair of the old machine being November 1st—and the further significant provision in each contract giving to the plaintiff 60 days' time for assembling, erect-

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ing, and fully installing both machines from and after their shipment, such time being subject to enlargement for cause specified.

Assuming that the legal effect of this testimony must now be considered as though it were in fact before the court, it necessitates the adoption of some rule of damages upon the case as made by the pleadings or upon pleadings and the proffered evidence; and, as indicated, it is not necessary to rest the ruling upon any possible merit of the special objection made by the plaintiff to the admissibility of this testimony, because no sufficient basis was laid in the pleading. Neither is it necessary to consider the variant rules of damages arising upon contracts of sale or of manufacture and sale. It is not necessary—and, if it were attempted, it could not be done—to frame a broad general rule, negative in its character, that profits as profits can never be recovered, or that they may not indirectly be pertinent evidence under some other rule or measure of recovery.

It is, however, proper to bear in mind the necessity in every case of adopting the most certain rule of recovery. It is thus stated by Mr. Mechem, in his work on Sales (volume 2, § 1779):

"And so, as between two possible methods by which the loss might be computed, the law prefers that which leads to the more certain and least speculative results. Thus, as has been seen, the damages to be recovered for not supplying a machine or other article as agreed are usually the market value for which another may be procured, and not the profits which might have been made from its use. And for like reasons the damages to be recovered for the loss of the use of the property are to be estimated with reference to rental value or fair interest upon investment, and not upon the uncertain and speculative basis on the profit which might have been made from its use."

The principles relating to the adoption of a rule of damages to be satisfied by a calculation of profits which a machine bargained for might have made during a delay period are so fully discussed in the two cases of Howard v. Stillwell & Bierce Manufacturing Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, and Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171, that the ruling in the present case, unless it can be justified upon their application to the facts before us, cannot be justified at all; and it may be noted that both of these authorities, and it is believed the great weight of all adjudications, treat the recovery of profits as possible only under exceptional circumstances, unless the engagement by its very terms discloses them to have been in effect, in whole or in part, a subject-matter of the bargain. In the Globe Case, after discussing the question respecting the absence in a contract of language appropriately disclosing items of damage within the contemplation of the parties in case of breach, Mr. Justice Holmes uses this language:

"It is true that as people, when contracting, contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties *probably would have said if they had spoken about the matter.* But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. The extent of liability in such cases is

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likely to be within his contemplation, and whether it is or not, should be worked out *on terms which it fairly may be presumed he would have assented to if they had been presented* to his mind."

Again:

"We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made."

He proceeds:

"This point of view is taken by implication in the rule that 'a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract'" (citing cases).

And further:

"The question arises, then, what is sufficient to show that the consequences were in contemplation of the parties in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing [citing cases]. But, in the language quoted, with seeming approbation, by Blackburn, J., from Mayne on Damages (2d Ed.) 10, in Elbinger Actien-Gesellschaft v. Armstrong, L. R. 9 Q. B. 473, 478: 'It may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to say *that he was told he would be answerable for them, and consented to undertake such liability.*' Mr. Justice Wills answered this question, so far as it was in his power, in British Columbia Sawmill Co. v. Nettleship, L. R. 3 C. P. 499, 508: 'I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. * * * If a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff's trade should prove successful and without a rival, had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And, though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, *under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.*'"

The Bierce Case announced a like view. That was an action for damages occasioned through the delay in remodeling a flour mill and installing a new type of milling machinery. It was sought to recover as damages the profits which would have resulted through an operation of the mill in particular in grinding up a stock of grain which the vendee had on hand, and the court, after ruling that the loss of such profits was speculative and remote, not resulting immediately from the alleged breach of a contract which contained no stipulation that profits would be made on flour from the wheat ground up by the machinery contracted to be furnished and erected, adds this as a final statement:

"Nor were there any special circumstances attending the transaction from which an *understanding between the parties could be inferred* that the plaintiff was to make good any loss of profits incurred by a delay in furnishing and putting up such machinery according to the terms of the contract."

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The general principle announced in these cases—and I am satisfied that it is the general principle sought to be applied in all cases—brings us to their applicability in the present situation upon testimony establishing three propositions of fact:

First. Upon their face, the contracts between the plaintiff and the defendant themselves negative the thought that the Bermingham-Sears-Roebuck contracts, whose life began January 1, 1917, were, in respect of the time of commencement, deemed to be of the essence of the machine contracts; for by the principal of the latter contracts the defendant, in any event, had until February 1, 1917, to install the machine, and the contracts prescribed the consequences which should ensue a delay in installation, namely, a postponement of the maturity of two of the purchase-money notes.

Second. The Bermingham-Sears-Roebuck memorandum (Exhibit 5), which, of course, must be read into the contract of the defendant with the Bermingham-Seaman Company, contains this provision:

"We propose [to furnish, etc.] subject to the following specifications and conditions:

"(1) Duration of contract to be five years from January 1, 1917, *providing we succeed in erecting plant and have same running by that time, or five years from actual date plant starts operation, which will be not later than July 1, 1917.*"

Third. Closely related to the last above is this: There is not a syllable or suggestion in the evidence that by reason of the delay the defendant in fact defaulted upon the contracts constituting the "special circumstances"; nor is there any proof that it was in fact disenabled from fully carrying out the terms of the contracts from and after the deferred date, July 1, 1917. In short, the second consideration above shows that the so-called special circumstance—the existence of a contract with a third person, communicated to the plaintiff—was inherently not a special circumstance because its life, while nominally beginning January 1, 1917, was made contingent in its commencement upon the very circumstance of delay which is at the foundation of the present action. In other words, the contract, while nominally dating from January 1, 1917, was ambulatory.

Upon the trial of the case some of the matters above pointed out were referred to as a basis of the court's ruling. The court said, in discussing the exceptional cases noted in the two cases cited:

"The exceptions, if they exist at all, require great particularity of evidence to support the proposition that the vendor, the manufacturer, was apprised of those [them] with such certainty that he ought not in fairness and in justice to be heard to say that he did not have in mind—that both parties did not have in mind—the contemplated loss which would ensue through a failure to regard time as of the essence of the contract. Now, there is no suggestion here that Pusey & Jones could in fairness be said to have been acquainted with the idea, which is now sought to be pressed; that a failure to have this machine in place November 1st, December 1st, January 1st, or February 1st, should entail the consequences of a guaranty or an indemnity against loss of profits upon contracts which certainly were not communicated to them except in this very general way."

Again:

"The evidence offered so far is not such that the court or this jury should be heard to say 'why Pusey & Jones understood that the Combined Locks

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Company were to lose $9.78 a ton' because the talk was of a general nature. It is a talk which could be indulged in, and usually is indulged in, in negotiations for this sort of a repair or a sale, and the rule, if extended upon the strength of such general testimony as that, simply amounts to no rule at all—simply amounts to superseding the contract. Now, that the parties here had in mind anything of that kind I do not believe should be left open to inference upon the testimony offered so far."

Coming, therefore, to a direct application of the principles, and upon evidence which negatives with particularity the idea that the parties contemplated the consequences of a loss of profits, is it possible to permit a jury to infer, nevertheless, that both parties contemplated such consequences as fully as though they had really agreed thereto? It seems absurd to say that a contract containing a nominal date, January 1, 1917, even standing alone, should be made the basis or should be considered as a special circumstance justifying an award of special damage, merely because its existence was communicated to the vendor when the vendor and vendee entered into formal contracts which on their face give the vendor a leeway in performance, extending very substantially beyond the date of the special circumstance contract. But when it appears that the date, January 1, 1917, was, after all, not binding upon the vendee, that by an express proviso of the contract he had relieved himself by getting six months' leeway in order to meet the precise contingency which has arisen in the present case, namely, a delay in installing machines, it is not only idle, but it would be monstrously unjust, to permit him to impose upon the vendor consequences which might have ensued had the vendee's contract with the third person been binding as of the earlier date.

This situation impresses me as a fundamental obstacle to the application of the general principle controlling an award of special damages involving profits as such, which a machine might have earned. In other words, no matter how clearly it may have been the desire, hope, or expectation of the defendant to have the machine installed by January 1st, it very clearly and by the express terms of the Sears-Roebuck contract contemplated the possibility, if not the probability, of being unable to have it at that time. Therefore, having such contemplation from its side, can it be heard to say that the plaintiff here did not contemplate, or, upon full disclosure of the facts, would not have contemplated, the very same thing, but, on the contrary, contemplated its rigid responsibility to the defendant for loss of profits upon a contract which, by express reservation and proviso, the defendant was not obliged to perform on or begin performance until six months later. As I understand the rule, the contemplation of one of the parties is not sufficient; it must be a mutual and reciprocal contemplation produced by such particularity of attendant circumstances as should preclude both parties from saying that they were not, in effect, in law incorporated into the engagement.

We are brought to the next consideration, that the defendant did not, and could not, default upon its contract with Bermingham & Seaman, and therefore did not and could not, prior to July 1, 1917, lose any profit which it might have made upon the sale of the product to be manufactured pursuant to that contract. The most to be said is that it did not *enjoy* such profits from and after the earlier date. It

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does not and cannot claim that plaintiff's delay entailed a breach of its contract with Bermingham & Seaman, resulting in a loss of profits upon that contract, because it was within its right, as already observed, to simply move the date of commencement forward, not exceeding six months, and presumably that is just what was done. In other words, the notion of special damage, because of an actual loss of profits, is wholly negatived.

It is unnecessary to consider whether the defendant might not, upon some other theory, have established a claim for damages because of the delay. The course of the trial, in connection with the offer and rejection of the testimony upon the items of defendant's bill of particulars, brought it to the position where, its testimony respecting profits as such having been rejected, it was obliged to substantiate the other items upon some variant theory of damage. But it formally declined to proceed with any offer of proof to support, for example, a claim for deprivation of the use of the machine, to be measured either by interest upon the contract price, or upon payments made, or by some other standard, and formally elected to rest its whole case upon its offer to show loss of profits. In this situation there was no alternative, except to direct the verdict in favor of the plaintiff, both upon the complaint and upon the counterclaim.

I am satisfied to adhere to the ruling upon such motion for direction, and the motion for a new trial will be denied; and an order may be entered accordingly.

George B. Hudnall, of Milwaukee, Wis., for plaintiff in error.

Jackson B. Kemper, of Milwaukee, Wis., for defendant in error.

Before BAKER and EVANS, Circuit Judges, and ENGLISH, District Judge.

PER CURIAM. In denying a motion for a new trial, the learned District Judge filed an opinion reported in 255 Fed. 700, under the title of Pusey & Jones Co. v. Combined Locks Paper Co., which fully and fairly sets forth the issues and the facts. We approve of the opinion and herewith adopt it. The judgment is affirmed.

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MEMORANDUM DECISIONS

(258 Fed. 989)

THE BRIS. (Circuit Court of Appeals, Second Circuit. April 22, 1919.) No. 141. Appeal from the District Court of the United States for the Southern District of New York. Suit in admiralty by the Standard Varnish Works against the steamship Bris; Rederiaktiebolaget, claimant. Decree for claimant, and libelant appeals. Affirmed. For opinion below, see 253 Fed. 259. Julius J. Frank, of New York City, for appellant. Haight, Sandford & Smith, of New York City, for appellee. Before ROGERS and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

(258 Fed. 989)

EDWARDS et al. v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. April 22, 1919.) No. 1701. In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge. Criminal prosecution by the United States against Samuel Edwards and Lee Edwards. Judgment of conviction, and defendants bring error. Affirmed. Nathaniel T. Green, of Norfolk, Va., for plaintiffs in error. Hiram M. Smith, U. S. Atty., of Richmond, Va. Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

PER CURIAM. Careful examination of the record in this case shows that the judge was so clearly right, and the principles of law so simple and well established, that no statement of reasons for affirming the judgment would be of value. Affirmed.

(258 Fed. 989)

LOUISVILLE & N. R. CO. v. EVANS, U. S. District Judge. (Circuit Court of Appeals, Sixth Circuit. February 7, 1919.) No. 3266. Petition for Writ of Mandamus. Helm Bruce and Henry L. Stone, both of Louisville, Ky., for petitioner.

PER CURIAM. Leave to file petition granted, motion for rule to show cause denied, and petition dismissed.

(258 Fed. 989)

THE MORRISTOWN. (Circuit Court of Appeals, Second Circuit. April 25, 1919.) No. 211. Appeal from the District Court of the United States for the Southern District of New York. Suit in admiralty by Henry Crew and others against the steam tug Morristown; the Delaware, Lackawanna & Western Railroad Company, claimant. Decree for respondent, and libelants appeal. Affirmed. Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellants Crew and others. A. J. McMahon, of New York City, for appellant Delaware, L. & W. R. Co. Ellis W. Leavenworth, of New York City, for the Morristown. Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

(258 Fed. 990)

STENNICK v. JONES et al. (Circuit Court of Appeals, Ninth Circuit. June 2, 1919.) No. 3139. Suit by Parker Stennick, trustee in bankruptcy of the Hamilton Creek Timber Company and the Rainier Lumber & Shingle Com-

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pany, against Willard N. Jones, Fred A. Kribs, and the J. K. Lumber Company. From the decree, complainant appealed. On appellant's motion in respect to the item of $50,000, referred to in the memorandum opinion filed on motions and counter motions for modification of original opinion and decision of this court, and appellees' motion with respect to costs. Motion for modified order in respect to costs denied.

PER CURIAM. Upon further consideration of the matter, we hold that when an accounting is had the item of $50,000 referred to in the memorandum opinion (256 Fed. 354, 167 C. C. A. 524) filed as an addendum to our original opinion (252 Fed. 345, 164 C. C. A. 269) should not be allowed as a set-off, for the reason that defendants averred in their answer that they never sought to exercise any of the options in the contract executed by Dodge and his companies to secure defendants in lending their names for the loan of the $50,000, and that they never attempted to enforce any of the security given them by such contract, and that they "disclaim all rights under or interest in said contract," and that the claim of Jones and Kribs for the $50,000 has been proved as an unsecured claim against the bankrupt estates, and that the J. K. Lumber Company never has had any interest in or attempted to assert any rights under the contract of security for the loan. Considering these averments, our judgment is that appellees ought not to gain any special advantage over other creditors in respect to this $50,000. Appellees' motion for modified order in respect to costs is denied. Mandate forthwith.

(258 Fed. 991)

NORMA MINING COMPANY v. MACKAY. (Circuit Court of Appeals, Ninth Circuit. October 14, 1919.) No. 3319. On rehearing. Rehearing denied, but former judgment modified. For former opinion, see 258 Fed. 914, 169 C. C. A. 334.

PER CURIAM. The petition for rehearing is denied. The petition for modification of the judgment of this court is granted, so as to allow the appellant herein, Norma Mining Company, a corporation, 90 days after the mandate of this court is filed in the District Court within which to redeem the property which was the subject of the sale in this action, provided the appellant herein shall, before the expiration of 90 days after the filing of the mandate of this court, repay to Hugh Mackay, appellee herein, any and all amounts paid by him by virtue of the decree entered in the cause, and also all costs which he may have paid, together with any sums which he may have paid for taxes, together with interest upon any and all of such sums so paid out by him, at the legal rate of interest within the state of Arizona. Such sums and the amounts to be paid shall be ascertained by the District Court. Mandate forthwith.

END OF CASES IN VOL. 169

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II. EXCLUSION OR EXPULSION.

⇐27 (U. S. C. C. A. Cal.) A Chinese person, claiming right to re-enter the United States under Act Nov. 3, 1893, § 2 (Comp. St. § 4324), as having been a merchant in the United States for a year before his departure therefrom, may not thereunder, and under rule 15, subd. 11, of the Department of Labor, as to admission of Chinese claiming such right of re-entry, be denied admission by the Commissioner of Immigration on the ground that his original entry was unlawful; but this is a matter for determination in a deportation proceeding before a different tribunal.—Chin Fong v. White, 569.

⇐32(12) (U.S.C.C.A.Cal.) On appeal in habeas corpus proceedings by two Chinese, seeking admission to the United States as sons of a native-born citizen, a claim or objection as to the proceedings of the immigration officers, not set forth in the petition for the writ, and not made in the court below or on appeal, but made for the first time in the addendum to counsel's brief after submission of the case on appeal, cannot be considered, in the absence of a record presenting the proceedings referred to.—Jeung Bock Hong v. White, 161.

⇐32(13) (U.S.C.C.A.Cal.) If, taking together discrepancies in the testimony of two Chinese applying for admission to the United States as sons of a native-born citizen, the executive officers of the Immigration Bureau and the Department of Labor found the evidence in support of the right to land and enter the United States was so impaired as to render it unsatisfactory, the court, on application of the Chinese for habeas corpus, is not authorized to reverse the conclusion.—Jeung Bock Hong v. White, 161.

Where the court cannot say that proceedings relative to the exclusion from the United States of two Chinese, claiming to be sons of a native-born citizen, were manifestly unfair, or that the actions of the executive officers of the Immigration Bureau or Department of Labor prevented fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute, the order of the executive officers within the authority of the statute is final.—Id.

III. IMMIGRATION.

⇐51 (U.S.C.C.A.Hawaii) A Japanese prostitute, a resident of Hawaii before the treaty of annexation, was not immune from deportation under the statute on any ground that she did not "enter" the United States, within its purview.—Tama Miyake v. U. S., 20.

⇐54 (U.S.C.C.A.Hawaii) Dismissal of proceedings in the district court of Honolulu under the laws of Hawaii against a Japanese woman on the charge she was keeping a house of ill fame, resorted to for the purpose of prostitution, was not necessary to give the immigration officials the right to proceed against the woman for her deportation, and her acquittal by a jury, had she been tried, would have been no obstacle to her deportation, so that dismissal of the proceedings in the territorial court did not deprive her of her constitutional right to trial by jury.—Tama Miyake v. U. S., 20.

ALTERATION OF INSTRUMENTS.

See Joint Adventures, ⇐4; Trusts, ⇐110.

AMBASSADORS AND CONSULS.

See Admiralty, ⇐39, 72; International Law, ⇐10.

⇐5½ [New, vol. 8A Key-No. Series] (U.S.C.C.A.N.Y.) The Russian Supply Committee in America, created in 1915 to have charge of the purchase of supplies and munitions for the Russian government, certified in 1917 by the recognized Russian ambassador to have power to act in that behalf, *held* to have authority to make a settlement of contracts relating to purchase of munitions.—Agency of Canadian Car & Foundry Co. v. American Can Co., 379.

AMICUS CURIÆ.

See International Law, ⇐10.

ANIMALS.

See Appeal and Error, ⇐1053; Carriers, ⇐69, 211; Evidence, ⇐355, 357; Trial, ⇐85.

ANTI-NARCOTIC ACT.

See Criminal Law, ⇐371, 815, 1186; Poisons, ⇐2, 4, 9.

APPEAL AND ERROR.

See Courts, ⇐405; Criminal Law, ⇐1048-1188.

For review of rulings in particular actions or proceedings, see also the various specific topics.

III. DECISIONS REVIEWABLE.

(E) Nature, Scope, and Effect of Decision.

⇐100(2) (U.S.C.C.A.Mo.) Under Judicial Code, § 129 (Comp. St. § 1121), order denying petition to vacate a preliminary injunction was appealable.—Mississippi Valley Trust Co. v. Railway Steel Spring Co., 362.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

⇐177 (U.S.C.C.A.Ark.) Where a number of causes of action against the same defendants are joined in an action, if defendants are thereby given additional rights, as a greater number of challenges to jurors, such a right must be claimed at the trial, to entitle them to insist upon it in the appellate court.—United Mine Workers of America v. Coronado Coal Co., 549.

(C) Exceptions.

⇐263(1) (U.S.C.C.A.Ark.) An appellate court can review only that part of a charge to which exception was taken at the trial.—United Mine Workers of America v. Coronado Coal Co., 549.

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VI. PARTIES.

⇐334(3) (U.S.C.C.A.Ky.) Writ of error taken out by plaintiff, "D. R. Howard, trustee," *held* not taken by him as sole trustee, so as to have been abated by his death, and not to be revived in the name of his personal administrator.—Howard v. Leete, 68.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

⇐339(4) (U.S.C.C.A.Ill.) While a decree in a suit for patent infringement, solely enjoining the infringement and ordering an accounting, is a final decree in essence as to the equities of the bill, yet, as a matter of procedure, it is an interlocutory decree within the time for perfecting an appeal, and so, where an appeal was not perfected within 30 days, it must be dismissed.—Morey Linotyping Co. of Chicago, Ill., v. Chicago Lino-Tabler Co. of Chicago, Ill., 608.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(B) Scope and Contents of Record.

⇐518(4) (U.S.C.C.A.Ohio) Where it did not affirmatively appear from the record that plaintiff asked leave to amend an affidavit for attachment, a claim on writ of error that the dismissal of the attachment was improper, and that plaintiff should have been allowed to amend, cannot be considered.—Empire Fuel Co. v. Lyons, 40.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

⇐781(2) (U.S.C.C.A.Ky.) Where a water company sued the city to restrain enforcement of an ordinance and resolution, as impairing the obligation of the water supply contract between the company and the city and as depriving the company of its property without due process of law, and the city repealed its ordinance, the question involved became moot, and decree for the company will be reversed and the suit dismissed, despite the fact that the resolution of the city, involving a question of remote rather than present concern, was adopted after the beginning of suit and the repeal of the ordinance.—City of Paducah v. Paducah Water Co., 158.

⇐792 (U.S.C.C.A.Ohio) The Circuit Court of Appeals will, on its own motion, dismiss an appeal, where it appears that it was not taken in time.—Youtsey v. Niswonger, 154.

XVI. REVIEW.

(A) Scope and Extent in General.

⇐859 (U.S.C.C.A.Ohio) On writ of error, the Circuit Court of Appeals cannot weigh the evidence or determine a question of fact.—Empire Fuel Co. v. Lyons, 40.

(E) Presumptions.

⇐927(3) (U.S.C.C.A.N.Y.) On appeal from an order dismissing the complaint, after hearing all the evidence, it must be assumed, the order being one of nonsuit, that plaintiff's testimony is true, and he is entitled to every inference therefrom.—Hotel Woodward Co. v. Ford Motor Co., 338.

⇐928(2) (U.S.C.C.A.Ariz.) Refusing requested instructions is not reversible error, where no exception was taken to general charge, since it will be presumed that charge which was given properly presented all questions.—Southern Pac. Co. v. Stevens, 233.

(F) Discretion of Lower Court.

⇐977(1) (U.S.C.C.A.Mich.) Application for rehearing was addressed to the sound discretion of the trial judge, a discretion not reviewable on appeal, in the absence of a showing of its abuse.—Escanaba Traction Co. v. Burns, 48.

(G) Questions of Fact, Verdicts, and Findings.

⇐995 (U.S.C.C.A.Ohio) On writ of error, the Circuit Court of Appeals will not weigh the evidence.—O. C. Barber Mining & Fertilizing Co. v. Brown Hoisting Machinery Co., 139.

⇐1010(1) (U.S.C.C.A.Mich.) Where there was express testimony supporting the District Court's conclusion on an issue of fact (when testimony was taken in open court), the Circuit Court of Appeals is bound to accept such conclusion, unless the evidence decidedly preponderates against it.—Escanaba Traction Co. v. Burns, 48.

(H) Harmless Error.

⇐1047(1) (U.S.C.C.A.Alaska) Where rulings on the admissibility of evidence would not have affected the decree, which was based solely on a question of veracity of two witnesses, such rulings will not be reviewed on appeal.—Cascaden v. O'Connor, 80.

⇐1053(3) (U.S.C.C.A.Ariz.) Where a complaint alleged that a certain agent of defendant carrier agreed to furnish plaintiff live stock cars, any error in admitting a conversation regarding agreement by another agent is cured by instruction that recovery must be based on contract made with agent named in complaint.—Southern Pac. Co. v. Stevens, 233.

⇐1054(1) (U.S.C.C.A.Alaska) Where a case is tried by the court without a jury, the improper admission of evidence is no ground for reversal, where there was other evidence in the record sufficient to sustain the court's finding.—Cascaden v. Bell, 76.

⇐1066 (U.S.C.C.A.N.Y.) In action for death of passenger, killed when train started suddenly while he was alighting at a dark station, submission to jury of question of defendant's negligence in failing to provide sufficient train crew with other issues *held* prejudicial error, where there was no evidence of such insufficiency and a general verdict for plaintiff was returned.—New York Cent. R. Co. v. Lloyd, 197.

⇐1070(1) (U.S.C.C.A.Ark.) Where there were a number of plaintiffs in an action of tort, claiming damages in a gross sum, it is not prejudicial error that the jury returned a general verdict for plaintiffs, without apportioning the damages between them.—United Mine Workers of America v. Coronado Coal Co., 549.

(K) Subsequent Appeals.

⇐1097(1) (U.S.C.C.A.Ark.) A question of law decided by an appellate court becomes the law

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of the case, and will not be reconsidered on a subsequent review.—United Mine Workers of America v. Coronado Coal Co., 549.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(C) Modification.

⊂⊃1151(3) (U.S.C.C.A.Ohio) Where the record did not show that defendant's liability for an item was conceded, and that there was no room for contesting it, a modification of the judgment cannot be directed, so as to include such item, even though it was improperly excluded, on the ground that it was a matter cognizable only in a court of admiralty.—Empire Fuel Co. v. Lyons, 40.

(D) Reversal.

⊂⊃1178(6) (U.S.C.C.A.Ohio) A judgment may be remanded for trial upon a particular branch of the question, such as damages, or an issue relating to jurisdiction, without the judgment being reversed in toto.—Empire Fuel Co. v. Lyons, 40.

Where the amount of damages recovered was not palpably right or plainly insufficient, plaintiff cannot be awarded a new trial on the issue of damages, as he desired to retain the recovery already had.—Id.

(F) Mandate and Proceedings in Lower Court.

⊂⊃1194(1) (U.S.C.C.A.Alaska) Where the mandate of the Circuit Court of Appeals on reversal of an equity cause permitted appellee to file a motion for rehearing to enable him to introduce competent evidence on an issue, which was done and an order for rehearing made, but because of the prior ending of the term such motion was not available, the order may, on petition for prohibition, properly be treated as one for further examination of the issue on which reversal was ordered.—Ellis v. Reed, 639.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

⊂⊃1241 (U.S.C.C.A.N.D.) The surety on an appeal bond, conditioned for payment of the judgment, if affirmed, and one indemnifying such surety, are each concluded by the terms of the bond from denying the defendant's liability to pay the judgment.—Simonitsch v. Bruce, 347.

APPEARANCE.

See Bail, ⊂⊃79; Shipping, ⊂⊃209.

ARGUMENT OF COUNSEL.

See Criminal Law, ⊂⊃718–730.

ARMY AND NAVY.

See Bail, ⊂⊃79; Conspiracy, ⊂⊃47; Criminal Law, ⊂⊃338, 400, 430, 520, 778; Habeas Corpus, ⊂⊃16; Negligence, ⊂⊃93; Railroads, ⊂⊃350; War ⊂⊃4; Witnesses, ⊂⊃414.

⊂⊃20 (U.S.C.C.A.Md.) Action of an exemption board within the scope of its authority is final, and not subject to judicial review, when the investigation has been fair and its finding is supported by substantial evidence.—Arbitman v. Woodside, 457.

Rejection by exemption board of petitioner's claim to exemption as an alien who had not declared his intention to become a citizen, his showing being prima facie sufficient, and in no way met, but being disbelieved merely because other claims for exemption had been supported by false affidavits, was arbitrary and unfair, amounting to refusal to investigate.—Id.

⊂⊃40 (U.S.C.C.A.Cal.) An indictment charging that defendant, in a named city and between January and May, made seditious statements with intent denounced by the Espionage Act (Comp. St. 1918, § 10212a et seq.), and thereby willfully, unlawfully, and knowingly attempted to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States, is insufficient, where there was nothing to connect the acts of defendant directly or indirectly with such military or naval forces.—Shilter v. U. S., 12.

⊂⊃40 (U.S.C.C.A.Cal.) The exhibition of a picture during the existence of the war with Germany, calculated to show discord between the people of the United States and the British Empire by arousing feelings of indignation by portraying scenes in which British soldiers were depicted during the Revolutionary War as murdering noncombatant Americans, is a violation of Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), making it an offense for any person when the United States is at war to willfully cause or attempt to cause insubordination, mutiny, or refusal of duty in the armed forces of the United States, for the depicting of such scenes might cause insubordination, etc., of armed forces operating in connection with the British.—Goldstein v. U. S., 628.

An indictment, charging that defendant, by the exhibition of a moving picture calculated to cause feelings of indignation against England violated Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), making it an offense for any person to cause, or attempt to cause, insubordination, mutiny, or refusal of duty in the armed forces of the United States, *held* sufficient, in view of the fact that millions of men were being drafted, though it did not aver that soldiers witnessed the exhibition of the picture; it being alleged that the picture was publicly exhibited.—Id.

An indictment *held* to charge a violation of the Espionage Act, in that it alleged that defendant in aid of the German government had control of and was using a motion picture calculated to arouse feelings of enmity between the people of the United States and the British Empire, for the purpose of violating Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), making it an offense for any person to cause or attempt to cause any insubordination or refusal of duty in the armed forces of the United States.—Id.

⊂⊃40 (U.S.C.C.A.Iowa) An indictment under Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), for obstructing the recruiting and enlistment service, *held* sufficient, the trial *held* without prejudicial error, and a judgment of conviction sustained by the evidence.—Schumann v. U. S., 299.

⊂⊃40 (U.S.C.C.A.S.D.) Evidence *held* to sustain a conviction for violation of the Espionage Act (Comp. St. 1918, § 10212c), by using lan-

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guage with intent to obstruct recruiting and enlistment.—Rietz v. U. S., 19.

ASSAULT AND BATTERY.

See Criminal Law, ⇐365.

ASSIGNMENTS.

See Attorney and Client, ⇐98; Compromise and Settlement, ⇐19; Copyrights, ⇐50; Removal of Causes, ⇐116; Subrogation, ⇐31; Sunday, ⇐11, 15; Usury, ⇐37; Wills, ⇐743.

I. REQUISITES AND VALIDITY.

(B) Mode and Sufficiency of Assignment.

⇐43 (U.S.C.C.A.N.Y.) An assignment dated a year before it was actually made, through a clerical error which has done no harm, is not invalid as a forgery, since a "forgery" consists of the false making or material alteration of a writing which, if genuine, would be of legal effect, and doing so with intent to defraud.—Provident Life & Trust Co. v. Fletcher, 523.

⇐46 (U.S.C.C.A.N.Y.) The New York statute regulating the recording of assignments of interests in estates is not retroactive.—Provident Life & Trust Co. v. Fletcher, 523.

⇐58 (U.S.C.C.A.Mich.) Though it is the general rule at law that a debtor will be protected against the splitting up of claims against him, the rule has no application in equity, which can adjust the rights of all interested in a single suit, and it is settled doctrine in the state and federal courts that partial assignments are enforceable in equity, irrespective of acceptance by the debtor, and though made only by way of security; the sole control of the claim so assigned, as regards its settlement, not being regarded as left with the debtor.—Escanaba Traction Co. v. Burns, 48.

ASSOCIATIONS.

⇐19 (U.S.C.C.A.Ark.) Corporations or associations are liable for the torts of their members or employés, if encouraged in the commission of them, or if ratified thereafter.—United Mine Workers of America v. Coronado Coal Co., 549.

ASSUMPSIT, ACTION OF.

See Money Received, ⇐1.

ATTACHMENT.

See Appeal and Error, ⇐518; Removal of Causes, ⇐116.

ATTORNEY AND CLIENT.

See Criminal Law, ⇐718, 730, 1171, 1186; Pleading, ⇐367; Subrogation, ⇐31; Sunday, ⇐15.

II. RETAINER AND AUTHORITY.

⇐98 (U.S.C.C.A.Mich.) A traction company, which paid money due contractors to an attorney under authority therefor by a lender to and holder of an assignment from the contractors was not liable to the lender and assignee for the attorney's claimed misapplication of the funds in part.—Escanaba Traction Co. v. Burns, 48.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

⇐141 (U.S.C.C.A.Mo.) Where, in a suit in which the minority stockholders were successful, the final decree provided that the compensation fund reserved should be apportioned between the various solicitors, *held*, that the counsel who first protested against the action of the majority and brought suit in the state courts were entitled to compensation for their services in connection with such suit, though the litigation in which the minority shareholders were finally successful was in the federal courts, so that such counsel were entitled to $45,600 out of the entire fund of $104,299.—Thompson v. Bomar, 355.

AUTOMOBILES.

See Corporations, ⇐661; Negligence, ⇐93; Railroads, ⇐350.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

⇐75 (U.S.C.C.A.Pa.) Where defendants failed to appear for trial, and surety failed to produce them, their recognizances may be forfeited.—U. S. v. Fidelity & Casualty Co. of New York, 460.

⇐79(1) (U.S.C.C.A.Pa.) Under Rev. St. § 1020 (Comp. St. § 1684), authorizing court to remit recognizance forfeitures where public justice does not otherwise require, etc., the court's refusal to set aside forfeitures as to inmates of a bawdyhouse near a military camp, who did not appear until a week after date set for their trial, causing inconvenience regarding witnesses, the disposition of other cases, etc., was not error.—U. S. v. Fidelity & Casualty Co. of New York, 460.

BAILMENT.

See Damages, ⇐82; Estoppel, ⇐70; Limitation of Actions, ⇐46; Patents, ⇐216.

BANKRUPTCY.

See Conspiracy, ⇐28, 43; Criminal Law, ⇐681, 815; Internal Revenue, ⇐7; Judgment, ⇐678.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(C) Involuntary Proceedings.

⇐88(2) (U.S.C.C.A.Pa.) A petition to intervene in a bankruptcy case, after an order of adjudication or dismissal has been made, is addressed to the discretion of the court.—In re C. Jutte & Co., 438.

Where no order dismissing an involuntary petition in bankruptcy had been entered, though the trial court had expressed the opinion that it should be dismissed, *held* that, under Bank-

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ruptcy Act July 1, 1898, § 59f (Comp. St. § 9643), declaring that creditors other than the original petitioners may at any time enter their appearance and join in the petition such creditors might intervene, regardless of their laches, so long as the petition has not been formally dismissed.—Id.

⇐99 (U.S.C.C.A.Pa.) Though a court of bankruptcy expressed an opinion indicating its purpose to dismiss an involuntary petition, yet where no order of dismissal was drawn, as directed by the opinion, the petition in bankruptcy is not dismissed, and remains pending.—In re C. Jutte & Co., 438.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

⇐140(3) (U.S.C.C.A.N.Y.) Trustee in bankruptcy of a private banker cannot retain money given bankrupt for transmittal, although Banking Law N. Y. § 156, gives depositors for transmittal preferred claims against certain of banker's assets and authorizes them to also share pro rata with general creditors.—In re Jarmulowsky, 297.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

⇐165(2) (U.S.C.C.A.N.Y.) A voluntary conveyance of property by a bankrupt to his wife when insolvent *held* not in execution of a parol trust imposed by his grantor, and fraudulent as to his creditors.—Moran v. Morgan, 300.

⇐166(3) (U.S.C.C.A.N.Y.) A defendant *held* to have had knowledge that a bankrupt was insolvent at the time it took back property previously sold to him, which rendered the transaction a preference.—Egner v. Parshelsky Bros., 304.

⇐172 (U.S.C.C.A.N.Y.) Under Rev. St. § 3477 (Comp. St. § 6383), making void any assignment or transfer of an unallowed claim against the United States, a contract under which petitioner furnished automobile parts to bankrupt, to be used in filling a contract with the government, and which provided that all warrants received by bankrupt under its contract should be indorsed by it as agent and delivered to petitioner, *held* void, and such warrants received by the trustee *held* to inure to the benefit of general creditors.—In re Hudford Co. of New York, 10.

⇐184(1) (U.S.C.C.A.Okl.) A creditor of a bankrupt, holding a void mortgage on property, but which during more than a year, and while debts to other creditors were accruing, took no steps to reform its mortgage or assert a lien, *held* not entitled to a lien as against general creditors.—Rader v. Star Mill & Elevator Co., 541.

⇐198 (U.S.C.C.A.Okl.) A vendor's lien on property of a bankrupt, although established by a decree rendered within four months prior to the bankruptcy, is not one obtained through legal proceedings, and is not defeated by Bankruptcy Act 1898, § 67 (Comp. St. § 9651).—Rader v. Star Mill & Elevator Co., 541.

(D) Administration of Estate.

⇐223 (U.S.C.C.A.Wash.) Under Bankruptcy Act, §§ 40, 48, as amended by Act Feb. 5, 1903 (Comp. St. §§ 9624, 9632), and General Order No. 35, § 2, the District Court improperly allowed the referee in bankruptcy commissions of 1 per cent. of the total amount of the bankrupt's estate, amounting to $6,582.08, of which $1,085.60 was paid out for expenses of administration, leaving in excess of $5,000 from which to pay referee's commissions and for distribution among creditors.—In re Motridge, 539.

(F) Claims Against and Distribution of Estate.

⇐315(1) (U.S.C.C.A.Ala.) A fine adjudged against a corporation on its conviction for using the mail to promote frauds, under Criminal Code, § 215 (Comp. St. § 10385), is a "penalty," within the meaning of Bankruptcy Act July 1, 1898, § 57j (Comp. St. § 9641), not provable in bankruptcy.—U. S. v. Birmingham Trust & Savings Co., 502.

⇐317 (U.S.C.C.A.Ala.) A fine adjudged against a corporation on its conviction for using the mail to promote frauds, under Criminal Code, § 215 (Comp. St. § 10385), is a "penalty," within the meaning of Bankruptcy Act July 1, 1898, § 57j (Comp. St. § 9641), not provable in bankruptcy; but the United States is entitled to prove all the costs which it paid or incurred in the prosecution as a pecuniary loss sustained by it (citing Words and Phrases, First and Second Series, Penalty).—U. S. v. Birmingham Trust & Savings Co., 502.

⇐328 (U.S.C.C.A.Ala.) The United States may present a claim in a bankruptcy case at any time while the bankruptcy is pending and the funds thereof are not distributed.—U. S. v. Birmingham Trust & Savings Co., 502.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(A) Superintendence and Revision.

⇐440 (U.S.C.C.A.N.Y.) Bankruptcy court's order requiring bidder to pay balance of purchase price for bankrupt's property is reviewable by petition to revise, under Bankruptcy Act, § 24 (Comp. St. § 9585), but not by appeal.—In re Reilly, 207.

A bankruptcy court's order, improperly sought to be reviewed by appeal, instead of by a petition to revise, will be dismissed.—Id.

⇐440 (U.S.C.C.A.Ohio) Proceedings on motion by bankrupt after discharge to reopen estate on the theory that his interest in land had improperly been scheduled as life estate, instead of fee-simple estate, etc., *held* not to present a controversy arising in bankruptcy, appealable under Bankruptcy Act, § 24a (Comp. St. § 9608), but to be reviewable by petition to revise, under section 24b; it appearing that proceeding was of the most summary character.—Youtsey v. Niswonger, 154.

(B) Appeal.

⇐461 (U.S.C.C.A.Ohio) While an appeal, under Bankruptcy Act, § 25a (Comp. St. § 9609), providing for appeals in bankruptcy proceedings, must be taken within the 10 days permitted, an appeal under section 24a (section 9608)

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relating to appeals in controversies arising in bankruptcy, may be taken at any time within 6 months.—Youtsey v. Niswonger, 154.

BANKS AND BANKING.

See Bankruptcy, ⇐140; Contracts, ⇐101; Indictment and Information, ⇐125; Receivers, 77; Taxation, ⇐11.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

⇐80(6) (U.S.C.C.A.N.Y.) Banking Law N. Y. § 156, giving persons making deposits for safekeeping or transmittal preferred claims against certain funds upon a private banker's insolvency, does not prevent such depositor from recovering money which he can trace and identify.—In re Jarmulowsky, 297.

IV. NATIONAL BANKS.

⇐257(1) (U. S. C. C. A. Ark.) An indictment against the president of a national bank *held* to properly charge him, not as principal, but as accessory to the making of a false entry in a report to the Comptroller, in that he abetted, aided, counseled, and procured such entry to be made by the cashier.—Boone v. U. S., 113.

⇐257(3) (U.S.C.C.A.Ark.) On trial of the president of a national bank, charged with aiding and abetting the making of false reports to the Comptroller, evidence of the condition of his account and his indebtedness to the bank, although as it stood at a later date than the reports, *held* admissible.—Boone v. U. S., 113.

⇐257(4) (U.S.C.C.A.Ark.) Evidence on trial of the president of a national bank for violation of the statute *held* sufficient to require submission of the case to the jury.—Boone v. U. S., 113.

BILLS AND NOTES.

See Action, ⇐22; Contracts, ⇐101; Courts, ⇐311, 347; Equity, ⇐39; Evidence, ⇐419, 461; Injunction, ⇐163; Receivers, ⇐77.

BONDS.

See Appeal and Error, ⇐1241; Contracts, ⇐101; Judgment, ⇐708; Receivers, ⇐77, 157.

BREAKWATER.

See Navigable Waters, ⇐19.

CANALS.

See Negligence, ⇐51.

CANCELLATION OF INSTRUMENTS.

See Action, ⇐22; Contracts, ⇐261, 323; Corporations, ⇐320; Courts, ⇐311, 347; Equity, ⇐39, 345; Insurance, ⇐177; Jury, ⇐16; Mines and Minerals, ⇐45; Public Lands, ⇐120; Removal of Causes, ⇐116.

CARPET.

See Negligence, ⇐32.

CARRIERS.

See Appeal and Error, ⇐1053, 1066; Corporations, ⇐673; Evidence, ⇐355, 357; Shipping, ⇐108; Trial, ⇐85.

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

⇐47(1) (U.S.C.C.A.Ariz.) A chief clerk in manifest bureau of defendant railroad, with whom plaintiffs claimed to have contracted regarding the furnishing of live stock cars, *held* apparently authorized to represent defendant.—Southern Pac. Co. v. Stevens, 233.

⇐69(5) (U.S.C.C.A.Ariz.) Evidence that chief clerk in manifest bureau of defendant railroad acted as the traffic manager's assistant in agreeing to furnish plaintiffs live stock cars for shipment originating on a connecting road, etc., *held* to make his authority to bind defendant a jury question.—Southern Pac. Co. v. Stevens, 233.

III. CARRIAGE OF LIVE STOCK.

⇐211 (U.S.C.C.A.Pa.) Act Cong. June 29, 1906 (Comp. St. §§ 8651–8654), "to prevent cruelty to animals in transit," does not contemplate a divided, dual duty, but a single, unitary one to feed and water cattle in interstate transit, and the shipper may not escape liability for a part of the feed so furnished by the carrier under government inspection, because shipper placed a part of the required feed in the car without such inspection, prior to shipping.—Pennsylvania R. Co. v. Swift & Co., 305.

A carrier cannot recover from shipper the price of feed placed in the cars by virtue of the provisions of Act Cong. June 29, 1906 (Comp. St. §§ 8651–8654), requiring feeding in transit.—Id.

A carrier cannot recover from shipper the price of feed furnished and placed in cars upon an implied contract from acquiescence in such practice, where no claim of implied contract was asserted in the statement of claim filed or submitted to the jury and not pleaded, although there was sufficient evidence to warrant the issue.—Id.

CHANCERY.

See Equity.

CITIES.

See Municipal Corporations.

CITIZENS.

See Courts, ⇐317.

CIVIL RIGHTS.

See Constitutional Law, ⇐90.

CLERKS OF COURTS.

See Criminal Law, ⇐1186; Perjury, ⇐29.

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COLLISION.

See Towage, ⇐11.

I. RULES AND PRECAUTIONS FOR PREVENTING COLLISIONS IN GENERAL.

⇐17 (U.S.C.C.A.N.Y.) A vessel which violates a statutory rule must be held in fault for a following collision, in the absence of proof that such violation did not contribute thereto.—The Suffolk, 287.

V. OVERTAKING VESSELS.

⇐50 (U.S.C.C.A.N.Y.) An overtaking vessel, which had passed the one overtaken half or three-quarters of a mile before changing course, and was then 300 to 500 feet ahead, was "finally past and clear," within article 24 of the Inland Rules (Comp. St. § 7898), and relieved of the burden of keeping out of the way.—The New York Central No. 28, 493.

VI. VESSELS IN TOW.

⇐66 (U.S.C.C.A.N.Y.) Evidence *held* to show, contrary to finding below, that a tug failed to control her long tow, which swung with the tide into collision with libelant's tow, which was in its proper place near Staten Island shore.—The Aurora, 455.

VII. VESSELS AT REST, AT ANCHOR, OR AT PIERS.

⇐71(2) (U.S.C.C.A.N.Y.) A tug, which negligently attempted to take a coal barge out of a slip in East River on a strong flood tide on a hawser instead of alongside, *held* solely in fault for a collision between her and vessels lying at the end of the pier and resulting collisions between such vessels, which were broken from their moorings, and others.—The Daniel McAllister, 489.

⇐71(3) (U.S.C.C.A.N.Y.) A barge moored by her master without making soundings in a slip, with her bow to a pier, and left with no one on board, lying over the edge of a sloping bank from which she slipped at low tide, breaking her lines and coming into collision with another moored vessel, *held* in fault for the collision.—Clyde Lighterage Co. v. Pennsylvania R. Co., 202.

⇐71(3) (U.S.C.C.A.N.Y.) The fact that barges were tied up at the end of a pier in violation of the statute *held* not a contributory cause of a collision between them and a barge being towed from an adjoining slip, where there was ample room for the tow to pass safely if properly navigated.—The Daniel McAllister, 489.

IX. FOG OR THICK WEATHER.

⇐83 (U.S.C.C.A.N.Y.) A collision at sea in a dense fog between two steamships on crossing courses *held* due to faults of both; one being in fault for excessive speed, and both for failure to obey the imperative requirement of article 16 of the International Rules (Comp. St. § 7854) to stop their engines on hearing the signal apparently forward of their beams.—The Suffolk, 287.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

⇐95(2) (U.S.C.C.A.N.Y.) Two tugs, with tows, meeting and passing at Throgg's Neck at the same time as the passing of another tow, both *held* in fault for a collision between the tows; one for failing to give more room for the other tows to pass, and the other for not slowing when it was apparent that the space between the other tows was not wide enough for safe passage.—The Thomas J. O'Brien, 16.

⇐95(2) (U.S.C.C.A.N.Y.) Steam tug towing 12 boats in three tiers, with a boat tailing on the last tier, which, on rounding the Battery, in turning from the channel between the Battery and Governor's Island, to go into East River at New York, was swept away by the tide because she had not enough power for her tow, and so presented the end of her tow to a steamship skirting the shore of Governor's Island in a position that rendered collision inevitable, *held* at fault.—The Winfield S. Cahill, 334.

Tugs in charge of a steamship, which collided with starboard boat in the last full tier of another tug's tow through the fault of such other tug, *held* to have done all they could, and as soon as they should have, to avoid collision, having had no reason to anticipate the lack of power of the other tug, which caused the collision in conjunction with the tide, and having reversed as soon as they saw the tow swing down upon them.—Id.

⇐95(2) (U.S.C.C.A.N.Y.) One of two tugs, with tows, crossing at night in New York Bay, having a single scow in tow on a 100-fathom hawser, with the other tow on her starboard side, which crossed the course of the other without even signaling, *held* solely in fault for a collision between the tows.—The North America, 643.

⇐96 (U.S.C.C.A.N.Y.) Evidence *held* to sustain the claim of libelant that respondent tug or her tow, which she was maneuvering into place in a slip, came into collision with libelant's canal boat, which was being discharged on a pier in the slip.—The Mahanoy, 200.

⇐102 (U.S.C.C.A.N.Y.) A collision between a ferryboat and steam lighter, both passing down Hudson River, *held* due to faults of both vessels; the ferryboat, which was ahead, for unnecessarily changing her course across that of the lighter, and the latter for proceeding at full speed, without paying any attention to the passing signals and positions of the vessels ahead.—The New York Central No. 28, 493.

XII. SUITS FOR DAMAGES.

(C) Evidence.

⇐125 (U.S.C.C.A.N.Y.) Evidence *held* to show that there was not even a reasonable probability of a steamship injured by a collision earning any charter money under the charter in question, either when she was in collision, or during the three-day period of her repairs; her owner having been "blacklisted" by the United States for reasons of state during the war with Germany and Austria.—The Winfield S. Cahill, 334.

(D) Damages.

⇐136 (U.S.C.C.A.N.Y.) Damages for loss of use of a vessel injured in collision cannot be

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awarded because she might have made some profit. The question is not of the possibility of employment, but of actual loss; not what possibly could have been made, but what would have been made.—The Winfield S. Cahill, 334.

COMMERCE.

See Corporations, ⇐661; Larceny, ⇐1, 55; Receiving Stolen Goods, ⇐8; Trade-Marks and Trade-Names, ⇐80½.

III. MEANS AND METHODS OF REGULATION.

⇐69 (U.S.C.C.A.Mich.) Pub. Acts Mich. 1907, No. 310, declaring that no foreign corporation shall be capable of making a contract within the state until compliance with provisions of the act, does not impose or attempt to impose a tax on all the capital of a foreign corporation, whether employed in state or interstate commerce, or to tax property permanently without the state, or to impose a fee upon its business done in the state, without distinction between state and interstate, and is not otherwise invalid.—Hayes Wheel Co. v. American Distributing Co., 31.

COMMISSIONS.

See Constitutional Law, ⇐62, 80; Evidence, ⇐23; Habeas Corpus, ⇐16.

COMMON LAW.

See Trade-Marks and Trade-Names, ⇐80½.

COMPROMISE AND SETTLEMENT.

See Ambassadors and Consuls, ⇐5½; Interest, ⇐46; Internal Revenue, ⇐7; Subrogation, ⇐31; Sunday, ⇐15.

⇐19(2) (U.S.C.C.A.Mich.) Equity would not set aside satisfaction of judgment in favor of contractors against a traction company, effected between the company and a lender to and holder of assignment from the firm of contractors, as well as others interested, where under the facts such action would not accord with equity and good conscience.—Escanaba Traction Co. v. Burns, 48.

In suit to set aside settlement by a traction company of judgment against it in favor of a firm of contractors who had assigned to lenders to them, reinstatement of writ of error from the Circuit Court of Appeals for review of the judgment *held* not a condition precedent to relief to plaintiffs, the lenders to and holders of assignment from the contractors, who had nothing to do with the dismissal of the writ of error or the discharge of the judgment.—Id.

CONSCRIPTION.

See Army and Navy, ⇐20; Habeas Corpus, ⇐16; War, ⇐4.

CONSPIRACY.

See Action, ⇐50; Criminal Law, ⇐412, 520, 619, 681, 780, 815, 825, 1056, 1059, 1171; Indictment and Information ⇐119, 171; Searches and Seizures, ⇐7; Witnesses, ⇐52, 298.

I. CIVIL LIABILITY.

(A) Acts Constituting Conspiracy and Liability Therefor.

⇐13 (U.S.C.C.A.Ark.) If unlawful acts were in pursuance of a conspiracy, and were committed before the conspiracy had been abandoned, or its object accomplished, all persons who were members of the conspiracy, or made themselves parties thereto at any time before it had been abandoned, or its object completed, are responsible.—United Mine Workers of America v. Coronado Coal Co., 549.

(B) Actions.

⇐19 (U.S.C.C.A.Ark.) In an action by receivers of coal-mining companies against a miners' organization, its subsidiaries, and members to recover damages for destruction of property, alleged to have been pursuant to a conspiracy, records of the organization, containing reports of conferences with operators employing only union miners, in which the organization pledged itself to do all in its power to protect such operators from competition by nonunion mines *held* relevant.—United Mine Workers of America v. Coronado Coal Co., 549.

In an action for conspiracy, the law permits great latitude in the introduction of evidence tending to establish the conspiracy, and connecting those advising, encouraging, aiding, abetting, and ratifying the overt acts committed for the purpose of carrying into effect the objects of the conspiracy.—Id.

In a civil action for conspiracy to destroy property, indictments of some of defendants for destruction of the property and pleas of guilty are admissible against them as admissions, and against their codefendants shown to have approved and ratified their unlawful acts.—Id.

Correspondence between an arms company and officers of a labor organization, showing a purchase by the latter of arms and ammunition and their shipment to local unions, by whose striking members they were used in a battle resulting in the destruction of plaintiff's mines, was admissible against the organization, in an action against it and its members for conspiracy.—Id.

In an action for conspiracy to destroy plaintiff's mines, as a result of which and the unlawful acts of defendants pursuant thereto their leases were forfeited, evidence of the value of such leases was admissible on the question of damage.—Id.

⇐21 (U.S.C.C.A.Ark.) Evidence *held* sufficient to warrant submission to the jury of the question of conspiracy between the organization, United Mine Workers of America, and its subsidiary district and local unions and their members, to destroy plaintiff's mine property, and to support a verdict finding such conspiracy, and that the destruction of the property was the result thereof.—United Mine Workers of America v. Coronado Coal Co., 549.

II. CRIMINAL RESPONSIBILITY.

(A) Offenses.

⇐28 (U.S.C.C.A.Ill.) Insolvent debtors can be guilty of conspiracy to hide their property, so that their creditors cannot reach it through bankruptcy proceedings, which the debtors are expecting to be instituted; it not being neces-

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sary that at the time of the conspiracy the proceedings should be pending and a trustee appointed.—Meyer v. U. S., 280.

⇐37 (U.S.C.C.A.Ohio) An indictment for conspiracy to defraud the United States and one for the offense which was the object of the alleged conspiracy are for different offenses.—Kelly v. U. S., 408.

(B) Prosecution and Punishment.

⇐43(6) (U.S.C.C.A.Ill.) In indictment for conspiracy to hide property in view of expected bankruptcy proceedings against defendants, averments that in furtherance of the conspiracy defendants turned over the check of H., belonging to them, to A., *held* not to allow inference that they lawfully turned it over.—Meyer v. U. S., 280.

⇐47 (U.S.C.C.A.N.Y.) Indirect evidence regarding defendant's participation in a conspiracy to defraud United States, by substituting inferior materials in army service hats, *held* to sustain a conviction.—Gilson v. U. S., 528.

CONSTITUTIONAL LAW.

For validity of statutes relating to particular subjects, see also the various specific topics.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

⇐62 (U.S.C.C.A.Ill.) Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission power to stop unfair methods of competition in commerce and declaring the same unlawful, is not an unlawful delegation of legislative and judicial power; Congress having by the act declared the public policy applicable to the situation.—Sears, Roebuck & Co. v. Federal Trade Commission, 323.

(B) Judicial Powers and Functions.

⇐68(1) (U.S.C.C.A.N.Y.) Who is the sovereign de jure or de facto of a country is a question for the political department of the government, and the decision by that department in this country is conclusive upon the courts.—Agency of Canadian Car & Foundry Co. v. American Can Co., 379.

(C) Executive Powers and Functions.

⇐80(2) (U.S.C.C.A.Ill.) Act Sept. 26, 1914, § 5 (Comp. St. 8836e), giving the Federal Trade Commission power to stop unfair methods of competition in commerce, and declaring the same unlawful, is not an unlawful delegation of legislative and judicial power, Congress having by the act declared the public policy applicable to the situation.—Sears, Roebuck & Co. v. Federal Trade Commission, 323.

V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

⇐90 (U.S.C.C.A.S.C.) The Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), is not unconstitutional in making criminal in time of war statements or utterances which in time of peace might be within the constitutional rights of a citizen.—Hickson v. U. S., 587.

XI. DUE PROCESS OF LAW.

⇐275(2) (U.S.C.C.A.N.Y.) Seamen's Act March 4, 1915, § 4 (Comp. St. § 8322), requiring payment to seamen on demand of half wages earned at every port where the vessel shall load or deliver cargo, as applied to foreign seamen on foreign vessels entering American ports, although subversive of their contracts, is constitutional.—The Westmeath, 462.

CONTEMPT.

See Criminal Law, ⇐657.

CONTINUANCE.

See Criminal Law, ⇐1151; Pleading, ⇐367.

CONTRACTS.

See Appeal and Error, ⇐781; Assignments; Bankruptcy, ⇐172; Commerce, ⇐69; Compromise and Settlement; Corporations, ⇐673; Courts, ⇐95, 366; Evidence, ⇐394; Frauds, Statute of; Injunction, ⇐56; Interest, ⇐37; Internal Revenue, ⇐9; Limitation of Actions, ⇐28; Logs and Logging, ⇐8; Money Received, ⇐1; Municipal Corporations, ⇐374; Navigable Waters, ⇐19; Negligence, ⇐55; Patents, ⇐216; Principal and Agent, ⇐177; Receivers, ⇐74; Receiving Stolen Goods, ⇐8; Release; Sales; Shipping, ⇐49, 108, 126; Sunday, ⇐11; Towage, ⇐11.

I. REQUISITES AND VALIDITY.

(F) Legality of Object and of Consideration.

⇐101(1) (U.S.C.C.A.Mo.) The validity of a transaction whereby a trust company became the holder of a railroad's bonds as security for the railroad's note, and the status of the trust company as such holder, are to be determined by the law of the state of Missouri; the transaction having been a Missouri transaction.—Mississippi Valley Trust Co. v. Railway Steel Spring Co., 362.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⇐163 (U.S.C.C.A.Fla.) When a contract is in part printed, and in part written or typewritten, the printed part is to be given the effect called for by its language, except in so far as inconsistent or incompatible with the written or typewritten part.—The Addison E. Bullard, 248.

⇐176(1) (U.S.C.C.A.Ohio) The construction of an unambiguous contract is for the court, notwithstanding the construction involves consideration of attendant conditions and circumstances not in dispute.—Empire Fuel Co. v. Lyons, 40.

IV. RESCISSION AND ABANDONMENT.

⇐261(5) (U.S.C.C.A.Ohio) If time was of the essence of plaintiff's subcontract to install the metal doors in a building, etc., so far as concerns plaintiff's right, as distinguished from its obligation, to complete its work by a certain

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date, and defendants, the general contractors, did not have the building ready for installation of the doors at the time fixed for completion of the subcontract, plaintiff had the right to cancel such contract at the expiration of that date.—Gill v. Hale & Kilburn Co., 56.

V. PERFORMANCE OR BREACH.

⊂=323(3) (U.S.C.C.A.Ohio) Where the general contractors were required to complete within a specified time, and they let a subcontract for the metal doors, etc., to be completed October 1, time was not of the essence of the contract, so far as concerned the subcontractor's right, as distinct from its obligation, and so the fact that the general contractor was unavoidably delayed, and did not have the building far enough advanced for the doors to be installed at the time fixed for completion of that work, did not, as a matter of law, warrant the subcontractor in canceling its contract.—Gill v. Hale & Kilburn Co., 56.

Whether the delay of the general contractor in completing the building to such a point as would allow subcontractor to install metal doors, etc., before expiration of the time for completion of the subcontract, was so unreasonable as to warrant the subcontractor in canceling its contract, *held*, under the evidence, for the jury.—Id.

In subcontractor's action against contractor for damages for failing to permit plaintiff to perform prior to time when plaintiff's contract was to be completed, whether plaintiff had waived, or by its conduct was estopped to urge, defendant's failure to permit plaintiff to perform, *held* for the jury.—Id.

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II. TITLE, CONVEYANCES, CONTRACTS, AND REGULATIONS.

⊂=50 (U.S.C.C.A.N.Y.) A contract by which the author of a play granted to another "the sole and exclusive license and liberty to produce, perform and represent" the play in the United States and Canada, and in which the grantee agreed to continue the play "for at least 75 performances" during the ensuing season and "for each theatrical season thereafter for a period of five years," and that, if during any one year the play had not been produced for 75 performances, his rights should cease and determine and revert to the grantor, *held* not to terminate at the end of five years, but to continue in force so long as its obligations were performed by grantee.—Manners v. Morosco, 497.

An agreement for production rights in a play binding the parties, heirs, executors, assigns, administrators, and successors, is an assignment and not a mere license.—Id.

A contract granting "the sole and exclusive license and liberty to produce, perform and represent" a play, *held* to carry the motion picture rights.—Id.

CORPORATIONS.

See Action, ⊂=22, 50; Attorney and Client, ⊂=141; Bankruptcy, ⊂=315, 317; Banks and Banking; Carriers; Commerce, ⊂=69; Courts, ⊂=95, 274, 317, 366; Evidence, ⊂=368; Frauds, Statute of, ⊂=120; Injunction, ⊂=114; Internal Revenue, ⊂=7; Judgment, ⊂=678; Landlord and Tenant, ⊂=22; Mortgages, ⊂=151; Municipal Corporations; Payment, ⊂=89; Pleading, ⊂=258; Railroads; Receivers, ⊂=157; Trade-Marks and Trade-Names, ⊂=43; Trial, ⊂=141.

VI. OFFICERS AND AGENTS.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

⊂=320(13) (U.S.C.C.A.N.M.) In a suit by minority stockholders against the corporation officers and others for an accounting for corporate funds that came into the hands of individual defendants and for cancellation of corporate obligation and mortgages on the ground that they were taken fraudulently and without consideration, an order temporarily enjoining foreclosure or disposition of the mortgages is proper.—Monte Rico Min. & Mill. Co. v. Fleming, 192.

Where there was no contention that a corporation was not legally organized, or that it was insolvent, *held* that, in a suit by minority shareholders for cancellation of corporate obligations and mortgages on the ground that they were taken fraudulently and without consideration, the complete stoppage of corporate affairs is unnecessary, and a decree enjoining foreclosure or disposition of the mortgages should not enjoin the corporation from employing any person on a salary other than a watchman, thus stopping all corporate affairs.—Id.

The right of a stockholder to sell his stock is one of the commonest incidents, and such disposition should not be enjoined in a suit by minority shareholders against the promoter and organizer of the corporation whom it claimed misrepresented the number of shares he received, etc., where it did not appear that the promoter was not the owner of the shares with all lawful rights implied by such ownership.—Id.

In a suit by minority stockholders who were denied access to the corporate books, an order providing that they should be allowed access to the books is sufficient in the first instance, and the books of the corporation should not be ordered by mandatory injunction to be deposited in court for inspection of the parties.—Id.

(D) Liability for Corporate Debts and Acts.

⊂=369 (U.S.C.C.A.Ohio) It is a rule of the criminal law, as well as the civil, that corporate agencies cannot shield themselves behind the corporation, where they are the actual and efficient actors in committing a fraud or an offense, and an indictment is good which charges defendants with committing an offense "while engaged as officers, agents, and employés" of a corporation.—Kelly v. U. S., 408.

VII. CORPORATE POWERS AND LIABILITIES.

(B) Representation of Corporation by Officers and Agents.

⊂=398(1) (U.S.C.C.A.N.Y.) The president or other general officer of a corporation has prima facie power to do any act which the directors could authorize or ratify.—Hotel Woodward Co. v. Ford Motor Co., 338.

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⊂⊃423 (U.S.C.C.A.Ark.) Corporations or associations are liable for the torts of their members or employés, if encouraged in the commission of them, or if ratified thereafter.—United Mine Workers of America v. Coronado Coal Co., 549.

⊂⊃433(1) (U.S.C.C.A.Ohio) Where an officer of defendant, known as comptroller, whose duty had to do with its auditing and treasury departments, and who at times acted as treasurer and at others as vice president, made a special promise to pay plaintiffs, who were furnishing lumber to a contractor doing work for the defendant, such officer cannot be held, as a matter of law, without authority.—Cincinnati Traction Co. v. Cole, 237.

XII. FOREIGN CORPORATIONS.

⊂⊃642(4½) (U.S.C.C.A.Ohio) The fact that the general manager of a West Virginia corporation, who resided in Ohio and maintained an office there as managing agent of another corporation, maintained a file for the West Virginia company, so as to carry on from his Ohio office correspondence necessary between himself and the West Virginia corporation, does not show that such corporation was doing business in Ohio.—Empire Fuel Co. v. Lyons, 40.

⊂⊃642(6) (U.S.C.C.A.Ohio) A sporadic or occasional sale in Ohio of coal, made by a West Virginia company, whose mines were in the latter state, does not constitute doing business in Ohio.—Empire Fuel Co. v. Lyons, 40.

Doing business within the state does not necessarily require that it be done persistently and continuously, in order to justify service of process on an agent of a foreign corporation which does business within the state.—Id.

⊂⊃661(2) (U.S.C.C.A.Mich.) Plaintiff, a foreign corporation, *held* to have a substantial local and domestic business entirely separate from, and not merely incidental to, its interstate business, so that it could not, where it had not complied with Pub. Acts Mich. 1907, No. 310, maintain suit for unpaid commissions, as well as anticipatory damages on account of cancellation of contract for sale on commission "for the entire United States" of automobile wheels manufactured by defendant, a Michigan corporation, in view of Comp. Laws Mich. 1897, § 10467.—Hayes Wheel Co. v. American Distributing Co., 31.

⊂⊃673 (U.S.C.C.A.Ohio) Where a West Virginia mining company, the capacity of whose mines was about 600 tons per day, contracted for the transportation of a large part of its produce by boat into Ohio, and thence by rail to a city therein, such contract was important on the question of whether the West Virginia company was doing business in Ohio.—Empire Fuel Co. v. Lyons, 40.

COSTS.

See Bankruptcy, ⊂⊃317.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

⊂⊃13 (U.S.C.C.A.Mich.) Costs in equity cases are within the sound discretion of the court.—Nelson v. Lloyd Mfg. Co., 26.

COUNTIES.

See Constitutional Law, ⊂⊃68; Taxation, ⊂⊃11.

COURT RULES CITED.

Equity Rules 22, 23, 30.—68.
Equity Rule 73.—362.

COURTS.

See Admiralty, ⊂⊃39, 72; Appeal and Error, ⊂⊃859, 1194; Constitutional Law, ⊂⊃68; Criminal Law, ⊂⊃1048, 1130, 1188, 1218; Equity, ⊂⊃39, 345; International Law, ⊂⊃10; Judgment, ⊂⊃472; Perjury, ⊂⊃9; Removal of Causes; Trial, ⊂⊃193; Witnesses, ⊂⊃48.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) Rules of Decision. Adjudications, Opinions, and Records.

⊂⊃95(2) (U.S.C.C.A.Mich.) The Supreme Court of Michigan having construed Pub. Acts Mich. 1907, No. 310, as making unenforceable a contract made by a foreign corporation before compliance with the act, notwithstanding compliance had while contract is still in force, the declaration of invalidity must be recognized by courts, state or federal, wherever suit may be brought for enforcement of contract.—Hayes Wheel Co. v. American Distributing Co., 31.

⊂⊃107 (U.S.C.C.A.Okl.) A decision of the Supreme Court of Oklahoma, construing state statutes and holding that the right of way of a street railroad company is assessable for paving benefits, where it is held in fee, *held* to also apply to right of way held by grant without reverter.—Oklahoma City v. Orthwein, 258.

VII. UNITED STATES COURTS.

(A) Jurisdiction and Powers in General.

⊂⊃274 (U.S.C.C.A.Ohio) Service in the federal district of Ohio on a West Virginia corporation will give the District Court for Ohio jurisdiction, if such corporation was doing business in Ohio in such a manner and to such extent as to warrant an inference that through its agents it was present there.—Empire Fuel Co. v. Lyons, 40.

In an action against a West Virginia corporation, begun by service of process out of the federal District Court for Ohio upon its agent found within that state, *held*, that the West Virginia corporation was doing business within the state of Ohio, so as to be subject to the jurisdiction of the federal court.—Id.

(C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.

⊂⊃311 (U.S.C.C.A.Ky.) District Court sitting in Kentucky *held* vested with jurisdiction over plaintiff, a trustee, and a citizen and resident of Ohio, suing to cancel notes given for the purchase price of coal-mining property, on the cross-suit of defendants, the holders of such notes, residing in and citizens of Vir-

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ginia, to recover thereon against plaintiff trustee.—Howard v. Leete, 68.

⊂=317 (U.S.C.C.A.Ohio) In determining jurisdiction of a federal court, parties must be aligned as plaintiffs or defendants, respectively, according to their mutual interests.—Iron Molders' Union, Local No. 68, v. Niles-Bement-Pond Co., 424.

In a suit by a corporation against a subsidiary corporation, of which complainant has complete control through stock ownership and common officers, and numerous ex-employés of defendant company and local labor unions, to enjoin acts of the latter named defendants growing out of a strike, and in which no relief is asked against the corporation defendant, such defendant must be aligned with complainant, and, if it is an indispensable party, the fact that it is a citizen of the same state as its codefendents will defeat the jurisdiction of a federal court.—Id.

(E) Procedure, and Adoption of Practice of State Courts.

⊂=332 (U.S.C.C.A.Ky.) The Supreme Court of the United States has power to confer by general equity rule No. 30 (118 C. C. A. v, 201 Fed. v) a right to relief on counterclaim which the trial court has undoubted power to give on actual hearing, and which it is its settled practice to give without its being affirmatively asked for.—Howard v. Leete, 68.

⊂=343 (U.S.C.C.A.Ark.) Where a state statute, as construed by its highest court, permits the joinder of plaintiffs or causes of action in an action at law, in the absence of federal legislation, such joinder may be made in a federal court in the state, under Conformity Act (Rev. St. § 914 [Comp. St. § 1537]).—United Mine Workers of America v. Coronado Coal Co., 549.

⊂=347 (U.S.C.C.A.Ky.) In view of the policy disclosed by general equity rules Nos. 22, 23 (115 C. C. A. xxiv, 198 Fed. xxiv), under No. 30 (118 C. C. A. v, 201 Fed. v), as to counterclaims, the District Court had jurisdiction to entertain defendant holders' counterclaim on the notes sought to be canceled in suit by plaintiff trustee, the purchaser of mining property, to rescind the purchase and cancel the purchase-money notes.—Howard v. Leete, 68.

(F) State Laws as Rules of Decision.

⊂=366(5) (U.S.C.C.A.N.Y.) In construction of local statutes, the federal courts must follow authoritative state decisions if found of sufficient clearness in the judgments of the courts of last resort.—Hotel Woodward Co. v. Ford Motor Co., 338.

⊂=366(7) (U. S. C. C. A. Mich.) The Supreme Court of Michigan having construed Pub. Acts Mich. 1907, No. 310, as making unenforceable a contract made by a foreign corporation before compliance with the act, notwithstanding compliance had while contract is still in force, the declaration of invalidity must be recognized by courts, state or federal, wherever suit may be brought for enforcement of contract.—Hayes Wheel Co. v. American Distributing Co., 31.

⊂=372(4) (U.S.C.C.A.S.C.) In cases involving construction of contracts affecting interests in real estate, even where, when the rights of the parties accrued, there was no settled law of decision in the state establishing a rule of property binding on federal courts, such courts should, unless strongly convinced of their error, follow the state decisions.—Norfolk Bank for Savings & Trusts v. Whipple, 647.

(H) Circuit Courts of Appeals.

⊂=405(12) (U.S.C.C.A.Wis.) The federal procedure is wholly statutory, and, when the statute limited appeals to final decrees, the meaning of "final" becomes a matter of statutory construction, and it is within the province of the court to declare that a "final order" is one that ends the litigation in the trial court, and that the legislative intent was against piecemeal appeals.—National Brake & Electric Co. v. Christensen, 600.

CRIMINAL LAW.

See Aliens, ⊂=54; Army and Navy, ⊂=40; Bail, ⊂=75–79; Banks and Banking, ⊂=257; Conspiracy, ⊂=19, 28–47; Constitutional Law, ⊂=90; Corporations, ⊂=369; Indictment and Information; Intoxicating Liquors; Larceny; Perjury; Poisons, ⊂=4, 9; Post Office, ⊂=32; Receiving Stolen Goods; Searches and Seizures, ⊂=7; War, ⊂=4; Witnesses.

III. PARTIES TO OFFENSES.

⊂=59(5) (U.S.C.C.A.Ohio) Under Criminal Code, § 332 (Comp. St. § 10506), making aiders and abettors principals, one formerly known as an accessory may be charged as a principal.—Kelly v. U. S., 408.

VII. FORMER JEOPARDY.

⊂=195(1) (U.S.C.C.A.Ohio) A plea of autrefois acquit is unavailing, unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea.—Kelly v. U. S., 408.

X. EVIDENCE.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

⊂=338(1) (U.S.C.C.A.S.C.) In a prosecution for violating Espionage Act June 15, 1917, testimony by a witness that he had been asked by the commissioner at the preliminary examination, if what he knew was not practically the same as that testified to by another witness, and that he responded in the affirmative, and that such evidence was true, was inadmissible, being irrelevant and collateral.—Caughman v. U. S., 450.

⊂=365(3) (U.S.C.C.A.Ohio) Where, in a trial for perjury, it became an issue of fact whether defendant assaulted and struck another during a strike, testimony that immediately after striking such person defendant followed up and struck his companion, who was associated with him in work, *held* admissible as part of the res gestæ.—West v. U. S., 429.

⊂=368(1) (U.S.C.C.A.N.Y.) Where two or more persons were associated for the same illegal purpose, any declaration or act of one of the persons in reference to the common object is admissible, when they are in furtherance of the common object or constitute a part of the res gestæ.—Fitter v. U. S., 507.

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(C) Other Offenses and Character of Accused.

⇐371(1) (U.S.C.C.A.Mo.) In a prosecution for violation of Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), evidence that defendant, a physician, dispensed the drug to addicts and to persons other than those specified in the indictment, is admissible to show his intent.—Thompson v. U. S., 264.

(E) Best and Secondary and Demonstrative Evidence.

⇐400(3) (U.S.C.C.A.N.Y.) Documents used as evidence in a naval court-martial, and required by statute to be transmitted to the Navy Department and there kept on file for two years, are "official documents" while so kept, and under Comp. St. § 1494, authenticated copies of such documents are admissible in evidence equally with the originals, and unauthenticated copies are inadmissible as secondary evidence. —Cohn v. U. S., 371.

(F) Admissions, Declarations, and Hearsay.

⇐412(3) (U.S.C.C.A.Ill.) Statements of firm's business condition, made by partners a month before bankruptcy proceeding, *held*, on prosecution of them for conspiracy to conceal assets from the trustee, in connection with proof of relatively small amount of property found by trustee, to be material circumstances in relation to the concealing of firm's assets, and admissible as declarations against partners making them.—Meyer v. U. S., 280.

(G) Acts and Declarations of Conspirators and Codefendants.

⇐423(1) (U.S.C.C.A.N.Y.) Where two or more persons were associated for the same illegal purpose, any declaration or act of one of the persons in reference to the common object is admissible, when they are in furtherance of the common object or constitute a part of the res gestæ.—Fitter v. U. S., 507.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

⇐430 (U.S.C.C.A.N.Y.) Documents used as evidence in a naval court-martial and required by statute to be transmitted to the Navy Department and there kept on file for two years are official "documents" while so kept, and under Comp. St. § 1494, authenticated copies of such documents are admissible in evidence equally with the originals.—Cohn v. U. S., 371.

(K) Confessions.

⇐520(1) (U.S.C.C.A.N.Y.) In a prosecution for conspiring to defraud the United States, confessions made by alleged coconspirators to a naval intelligence officer, who stated that it was the best thing for such persons to tell the truth, cannot be excluded as involuntary where no inducements were held out.—Fitter v. U. S., 507.

(M) Weight and Sufficiency.

⇐552(3) (U.S.C.C.A.N.J.) To justify a conviction of crime on circumstantial evidence, the latter must be such as to exclude every reasonable hypothesis but that of guilt.—Chase v. U. S., 631.

XII. TRIAL.

(A) Preliminary Proceedings.

⇐619 (U.S.C.C.A.Ohio) Rev. St. § 1024 (Comp. St. § 1690), investing trial judges with discretionary power to require indictments charging one or more persons with different, though connected, acts or transactions of the same class of crimes or offenses to be consolidated for trial, applies to separate indictments of the same persons; one charging conspiracy to commit a substantive offense, and the other charging its actual commission.—Kelly v. U. S., 408.

(B) Course and Conduct of Trial in General.

⇐657 (U. S. C. C. A. N. Y.) In a prosecution against the leaders of a religious society, who it was charged had violated the Espionage Act, where the government called members of the society and they proved unwilling witnesses, *held*, that the acts of the trial court in committing such witnesses for contempt, on the theory that they were falsifying when they refused to answer questions, but stated that they did not remember, etc., was under the circumstances so prejudicial to defendants that a new trial should be granted.—Rutherford v. U. S., 575.

(C) Reception of Evidence.

⇐681(1) (U.S.C.C.A.Ill.) Value of exception to receiving in evidence, on prosecution for conspiracy to conceal assets from trustee in bankruptcy, telegrams purporting to be signed by defendants and addressed to S. at D., without proof that defendants or either of them had authorized their transmission, was destroyed when S. thereafter testified that he received and answered the messages, and that in response to his answer one of defendants came to D. on the matter to which the messages related.—Meyer v. U. S., 280.

(E) Arguments and Conduct of Counsel.

⇐718 (U.S.C.C.A.N.Y.) Language that might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi judicial officer, and whose duty it is to act in the interest of justice; so where a prosecuting attorney's appeal for a conviction is upon considerations which have no legitimate bearing on the case, and which the jury have no right to consider, a conviction should be reversed unless it is apparent that no possible harm has resulted.—Fitter v. U. S., 507.

⇐730(1) (U.S.C.C.A.N.Y.) Where it was doubtful whether the jury heard an alleged improper remark by the prosecutor, who consented that it should be stricken and the court instructed them if they heard it to disregard it, the error was harmless.—Fitter v. U. S., 507.

(G) Necessity, Requisites, and Sufficiency of Instructions.

⇐778(5) (U.S.C.C.A.S.C.) In a prosecution for violating Espionage Act June 15, 1917, an instruction at the close of an extended charge, that a man "comes in clothed with the presumption of innocence, and that presumption continues until, in the opinion of the jury, the evi-

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dence is sufficient to show that he is guilty beyond a reasonable doubt, and from that time the burden is on him to establish his innocence," was misleading and prejudicial; the burden always being on the prosecution.—Caughman v. U. S., 450.

⇐780(4) (U.S.C.C.A.N.Y.) In a prosecution for conspiring to defraud the United States, where the jury had been charged that the testimony of confederates and accomplices should not be accepted unless corroborated, a further charge that the confessions of such confederates might be considered as corroboration was improper, allowing the confessions of his alleged coconspirators which were not in furtherance of the conspiracy to be used against defendant.—Fitter v. U. S., 507.

⇐814(3) (U.S.C.C.A.Ill.) Requested instruction, though stating a correct principle, is properly rejected, where there is no evidence to which it is applicable, as giving it would only becloud the issue.—Meyer v. U. S., 280.

⇐815(4) (U.S.C.C.A.Ill.) Requested instruction, on prosecution for conspiracy to conceal assets from trustee in bankruptcy, that if defendants, in anticipation of bankruptcy, had agreed to make absolute transfers of some of their property, they could not be found guilty, though such transfers would be voidable preference, was bad, as requiring an acquittal if transfers of "some" of their property were preferential only, in spite of clear evidence of concealment of other assets.—Meyer v. U. S., 280.

⇐815(4) (U.S.C.C.A.Mo.) In a prosecution against a physician for violation of the Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), a request to charge that a physician cannot be convicted for dispensing prohibited narcotics in the treatment of a patient whose application is by letter, where the physician reduces the amount of the dose for purpose of treatment, was properly refused, because omitting the indispensable conditions that the physician must furnish the drug in good faith and keep the required record. —Thompson v. U. S., 264.

(H) Requests for Instructions.

⇐825(2) (U.S.C.C.A.N.Y.) Instruction in a conspiracy case that commission of one of the overt acts alleged by one or more of defendants would sustain a conviction, etc., *held* not erroneous, because authorizing a conviction on an overt act not proven, or committed by a codefendant who had been acquitted, where no further instruction was requested.—Gilson v. U. S., 528.

(I) Objections to Instructions or Refusal Thereof, and Exceptions.

⇐844(1) (U.S.C.C.A.N.Y.) Exception to charge in criminal case must be specific, and not general.—Gilson v. U. S., 528.

(J) Custody, Conduct, and Deliberations of Jury.

⇐864 (U.S.C.C.A.N.Y.) Any communication from trial court to jury in a criminal case, not made in open court, is improper.—Dodge v. U. S., 316.

(K) Verdict.

⇐876½ (U.S.C.C.A.Ohio) An indictment for conspiracy to defraud the United States and one for the offense which was the object of the alleged conspiracy are for different offenses, and, where the cases are consolidated for trial, a verdict of acquittal under the conspiracy indictment is not inconsistent with a verdict of guilty under the other, although the overt acts charged in the former are some of acts relied on under the latter.—Kelly v. U. S., 408.

⇐991(2) (U.S.C.C.A.N.Y.) That the court exceeded its authority by providing that accused's imprisonment should be at hard labor does not invalidate the authorized portion of the sentence.—Dodge v. U. S., 316.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

⇐1048 (U.S.C.C.A.Mo.) Where no exceptions were saved in the District Court as to the matters complained of on writ of error, and the brief for plaintiffs in error contains no specification of the errors relied on in the Circuit Court of Appeals, such as is required by rule 24 (198 Fed. xxiv, 115 C. C. A. xxiv), there is nothing before the Circuit Court of Appeals to support the writ of error.—Sullivan v. U. S., 302.

⇐1048 (U.S.C.C.A.N.Y.) While plain error not raised by exception may be noticed on appeal, right to do so will not be exercised, unless it is evident that serious injustice will otherwise result.—Gilson v. U. S., 528.

⇐1056(1) (U.S.C.C.A.N.Y.) Any error in an instruction in a conspiracy case, claimed to permit jury to consider unproven overt acts does not authorize a reversal, in absence of an exception, where numerous overt acts were established by evidence.—Gilson v. U. S., 528.

⇐1059(1) (U.S.C.C.A.N.Y.) In a conspiracy case, exception to part of charge stating it would be sufficient if any one or more of alleged overt acts was established *held* insufficient to raise on writ of error question that charge allowed a conviction based on overt act not proven, or committed by a codefendant who had been acquitted. —Gilson v. U. S., 528.

(E) Assignment of Errors and Briefs.

⇐1129(2) (U.S.C.C.A.N.J.) A criminal case record, containing superfluous and overlapping assignments of error, disapproved.—Clark v. U. S., 453.

⇐1129(2) (U.S.C.C.A.N.Y.) The record should not be burdened with dragnet assignments of error, the purpose of the rule requiring assignments of error being to enable the court and opposing counsel to see on what points reversal of a judgment is sought and to limit discussion to those questions.—Fitter v. U. S., 507.

⇐1130(2) (U.S.C.C.A.Mo.) Where no exceptions were saved in the District Court as to the matters complained of on writ of error, and the brief for plaintiffs in error contains no specification of the errors relied on in the Circuit Court of Appeals, such as is required by rule 24 (198 Fed. xxiv, 115 C. C. A. xxiv), there is nothing before the Circuit Court of Appeals to support the writ of error.—Sullivan v. U. S., 302.

(G) Review.

⇐1144(14) (U.S.C.C.A.Ohio) It is not to be assumed in a criminal case, any more than in a

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civil case, that a jury cannot grasp the meaning of the court's instructions touching admissibility and purposes of evidence, even though a change in ruling in that behalf be involved.—Kelly v. U. S., 408.

⊂⊃1151 (U.S.C.C.A.Ohio) Refusal of the trial court to grant a continuance is reviewable only where it is clearly shown that there was an abuse of discretion.—Kelly v. U. S., 408.

⊂⊃1159(2) (U.S.C.C.A.N.Y.) Where record in a criminal case contains sufficient evidence on part of prosecution to require submission to jury, any reasonable doubt raised by accused's evidence is solely for jury, and will not be re-examined by appellate court.—Gilson v. U. S., 528.

⊂⊃1159(2) (U.S.C.C.A.Ohio) On review of the evidence in a criminal case, it is for the appellate court to determine only whether there was evidence introduced which was proper to go to the jury and legally sufficient to sustain the verdict.—Kelly v. U. S., 408.

⊂⊃1159(2) (U.S.C.C.A.Ohio) Where there is substantial testimony supporting the verdict in a criminal case, it cannot be disturbed by an appellate court on the ground of insufficiency of evidence.—West v. U. S., 429.

⊂⊃1159(4) (U.S.C.C.A.N.Y.) On appeal in a criminal case, the court cannot pass upon the veracity of witnesses.—Dodge v. U. S., 316.

⊂⊃1165(1) (U.S.C.C.A.N.Y.) Though the seizure of defendant's ledgers and books was an invasion of his rights guaranteed by Const. Amends. 4, 5, the introduction in evidence by defendant of the only pages in the ledger examined by the United States Attorney cured the error, if any existed, based on their having been for a time in the custody of government agents.—Fitter v. U. S., 507.

⊂⊃1166(1) (U.S.C.C.A.N.Y.) Though a seizure of defendant's ledgers without warrant was a violation of the rights guaranteed by Const. Amends. 4, 5, a conviction will not be reversed where neither the ledgers nor their contents were admitted in evidence, and witnesses were not allowed to testify as to information derived therefrom, etc.—Fitter v. U. S., 507.

⊂⊃1171(1) (U.S.C.C.A.N.Y.) In a prosecution for conspiracy to defraud the United States, argument of counsel for the United States, in so far as it appealed for a conviction on improper grounds, *held* harmless, in view of the overwhelming evidence of defendant's guilt.—Fitter v. U. S., 507.

⊂⊃1174(1) (U.S.C.C.A.N.Y.) Trial court's improper action in privately advising the jury that they might convict under a certain count is not reversible error, where no information was given which was not contained in original charge.—Dodge v. U. S., 316.

⊂⊃1178 (U.S.C.C.A.Mo.) Where the only exception to the admission of evidence was that the court erred in receiving over objection prejudicial and harmful evidence, and the point was not presented either in the brief or oral argument, the matter will be deemed waived.—Thompson v. U. S., 264.

(H) Determination and Disposition of Cause.

⊂⊃1186(1) (U.S.C.C.A.Ark.) That the evidence in support of the charges in certain counts of an indictment, on which defendant was acquitted, was stronger than that under the single count, on which he was convicted, is not ground for reversal.—Boone v. U. S., 113.

⊂⊃1186(4) (U.S.C.C.A.Ill.) Any misconduct of prosecuting attorney in making statement in argument, as matter of personal belief apart from the evidence, of there being no doubt of defendants' guilt, will not cause reversal; the record furnishing clear demonstration of guilt.—Meyer v. U. S., 280.

⊂⊃1186(4) (U.S.C.C.A.Mo.) In a prosecution for violating Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), exclusion of a letter written by the Commissioner of Internal Revenue, in response to an inquiry of defendant physician as to the dispensing of narcotics, *held* harmless, under Judicial Code, § 269 (Comp. St. § 1246), as amended by Act Feb. 26, 1919, if erroneous.—Thompson v. U. S., 264.

⊂⊃1186(4) (U.S.C.C.A.Ohio) Assuming that an indictment for perjury must be construed as averring that the oath was administered by the judge, whereas the proof was that it was administered by the deputy clerk in open court, the variance, where not prejudicial to defendant, is not ground for reversal, under Judicial Code, § 269, as amended by Act Feb. 26, 1919, which requires the court on any writ of error to give judgment on the entire record, "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."—West v. U. S., 429.

⊂⊃1188 (U.S.C.C.A.S.C.) Where a federal court has exceeded its authority in the sentence imposed on a convicted defendant, the error may be corrected by the appellate court by remanding the cause for appropriate sentence.—Hickson v. U. S., 587.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

⊂⊃1218 (U.S.C.C.A.S.C.) Unless a defendant convicted of crime is sentenced to imprisonment for a period longer than one year, or to hard labor, a federal court is without authority to order the sentence executed in a state penitentiary.—Hickson v. U. S., 587.

CURTESY.

See Wills, ⊂⊃607.

CUSTOMERS.

See Negligence, ⊂⊃32.

DAMAGES.

See Appeal and Error, ⊂⊃1070; Collision, ⊂⊃125, 136; Conspiracy, ⊂⊃19; Sales, ⊂⊃418, 442; Trespass, ⊂⊃11.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

⊂⊃20 (U.S.C.C.A.Ark.) All damages which are the natural and proximate results of a tort are recoverable.—United Mine Workers of America v. Coronado Coal Co., 549.

⊂⊃23 (U.S.C.C.A.Wis.) In an action for the price of a machine built by plaintiff for defendant, a counterclaim for lost profits be-

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cause of delay in delivery of the machine cannot be maintained, unless special circumstances are shown with respect to which the parties must be deemed to have contracted.—Combined Locks Paper Co. v. Pusey & Jones Co., 661.

⊂=40(4) (U.S.C.C.A.Wis.) The purchaser of a paper-making machine cannot set up, as a special circumstance entitling it to recover lost profits because of delay in delivery of the machine, a contract made by it for delivery of paper during five years, where by its terms it reserved the right to begin delivery at a date later than the actual installation of the machine.—Combined Locks Paper Co. v. Pusey & Jones Co., 661.

(C) Interest, Costs, and Expenses of Litigation.

⊂=69 (U.S.C.C.A.Ark.) In actions of tort the allowance of interest is discretionary with the jury, and the court may not allow interest where the jury has failed to do so.—United Mine Workers of America v. Coronado Coal Co., 549.

IV. LIQUIDATED DAMAGES AND PENALTIES.

⊂=82 (U.S.C.C.A.Mich.) In a contract for lease of machines, a provision that on failure to pay rent by the 10th of each month for the preceding month it should be increased 10 per cent. *held* void, as for a penalty.—Fellows v. National Can Co., 120.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

⊂=132(9) (U.S.C.C.A.Md.) *Held*, that $3,791 should be allowed a stevedore for injuries which necessitated the amputation of his leg below the knee, and caused a loss of wages and expenditure for medical attention amounting to $791.—Patapsco Ship Ceiling & Stevedore Co. v. Siebert, 134.

DEATH.

See Insurance, ⊂=232; Navigable Waters, ⊂= 19; Negligence, ⊂=51.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

⊂=9 (U.S.C.C.A.N.J.) Act March 27, 1917 (P. L. N. J. p. 531), supplementary to the Death Act, but which makes no change therein, except by providing that actions thereunder shall be brought by an administrator ad prosequendum, affects the procedure only, and applies to an action brought after its passage for a death which occurred prior thereto.—Public Service Electric Co. v. Post, 83.

⊂=31(1) (U.S.C.C.A.N.J.) Since a right of action for wrongful death is wholly statutory, only the person designated by the statute may maintain an action thereunder.—Public Service Electric Co. v. Post, 83.

⊂=31(4) (U.S.C.C.A.N.J.) An administrator with limited letters, appointed under Code Civ. Proc. N. Y. § 2559, to prosecute a right of action, has the same or equivalent powers as an administrator ad prosequendum, appointed under the New Jersey Death Act, as amended by Act March 27, 1917 (P. L. N. J. p. 531), to bring an action thereunder.—Public Service Electric Co. v. Post, 83.

Under Act March 26, 1896 (P. L. N. J. p. 173, 2 Comp. St. 1910, p. 2265, § 21), providing that "any executor or administrator by virtue of letters obtained in another state may prosecute any action * * * in any court of this state as if his letters had been granted in this state," an administrator with limited letters, appointed under the New York statutes, may maintain an action under the New Jersey Death Act, as amended by Act March 27, 1917 (P. L. p. 531).—Id.

DEEDS.

See Equity, ⊂=345, 436; Mortgages.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

⊂=1 (U.S.C.C.A.N.Y.) The law of the state in which the land is situated must alone be looked to for the rules governing its alienation and transfer, and for the effect and construction of conveyances of all kinds.—Hotel Woodward Co. v. Ford Motor Co., 338.

III. CONSTRUCTION AND OPERATION.

(E) Conditions and Restrictions.

⊂=145 (U.S.C.C.A.S.C.) If the language in a deed is of doubtful import, the court will construe it as a covenant, for breach of which damages may be recovered, rather than a condition working a forfeiture of the estate.—Norfolk Bank for Savings & Trusts v. Whipple, 647.

DESCENT AND DISTRIBUTION.

See Assignments, ⊂=43, 46; Executors and Administrators; Wills.

DISEASE.

See Master and Servant, ⊂=150, 256, 376.

DISLOYALTY.

See Army and Navy, ⊂=40; War, ⊂=4; Witnesses, ⊂=414.

DISMISSAL AND NONSUIT.

See Admiralty, ⊂=39; Aliens, ⊂=54; Appeal and Error, ⊂=518, 781–792, 927; Bankruptcy, ⊂=88, 99, 440; Trial, ⊂=169.

II. INVOLUNTARY.

⊂=44 (U.S.C.C.A.N.Y.) A dismissal not upon the merits is a "nonsuit."—Hotel Woodward Co. v. Ford Motor Co., 338.

DISORDERLY HOUSE.

See Aliens, ⊂=54; Bail, ⊂=79; War, ⊂=4.

DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, ⊂=718, 730, 1165, 1171, 1186.

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DIVIDENDS.

See Internal Revenue, ⇐⇒7.

DOCKS.

See Wharves.

DOWER.

See Wills, ⇐⇒607.

DRAFT ACT.

See Army and Navy, ⇐⇒20, 40; Habeas Corpus, ⇐⇒16; War, ⇐⇒4.

DRAMSHOPS.

See Intoxicating Liquors.

DROWNING.

See Negligence, ⇐⇒51.

DRY DOCKS.

See Insurance, ⇐⇒272, 312; Wharves, ⇐⇒20.

DUE PROCESS OF LAW.

See Constitutional Law, ⇐⇒275.

EASEMENTS.

See Courts, ⇐⇒107.

EJECTMENT.

See Judgment, ⇐⇒684, 747.

ELECTION OF REMEDIES.

⇐⇒3(2) (U.S.C.C.A.S.D.) It is an election between inconsistent remedies, preventing subsequent change, where one, defrauded in a purchase and knowing the facts, brings action for damages, instead of rescinding and suing for what he had paid.—Issenhuth v. Kirkpatrick, 309.

⇐⇒9 (U.S.C.C.A.S.D.) The rule that one, having with knowledge of the facts made an election between inconsistent remedies, abandons the other and may not elect again, is not changed by Judicial Code, § 274a (Comp. St. § 1251a), authorizing a party to amend his pleading, to obviate objection that action was brought on the wrong side of the court.—Issenhuth v. Kirkpatrick, 309.

EQUITY.

See Appeal and Error, ⇐⇒1194; Assignments, ⇐⇒58; Compromise and Settlement, ⇐⇒19; Costs, ⇐⇒13; Courts, ⇐⇒332, 345; Injunction; Judgment, ⇐⇒423, 429; Jury, ⇐⇒16, 31; Money Received, ⇐⇒1; Patents, ⇐⇒317, 323, 327; Public Lands, ⇐⇒120; Subrogation; Trial, ⇐⇒211; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

⇐⇒39(4) (U.S.C.C.A.Ky.) In suit by trustee to cancel promissory notes given for coal-mining property, and for relief from liability thereon, the District Court had jurisdiction, on finding for defendant holders of the notes, to render judgment against plaintiff trustee on the holders' counterclaim on the notes, since equity will retain jurisdiction of subject-matter properly acquired to do complete justice, though it involves determination of legal rights.—Howard v. Leete, 68.

V. EVIDENCE.

⇐⇒345 (U.S.C.C.A.Or.) The doctrine that, where an answer under oath is not waived in the bill, the denials in a verified answer as to all matters within the personal knowledge of the party answering must be overcome by the evidence of witnesses, or by one witness corroborated by circumstances equivalent in weight to another witness, did not rest upon any specific rule promulgated by the Supreme Court, but upon the general equity practice.—Watts v. Crabb, 5.

Regardless of any change which the new equity rules of 1912 might have had on a sworn answer, a decree for complainants in a suit to set aside deeds on the ground that grantor was old and feeble and unduly influenced *held* not open to attack on the theory that a verified answer was filed, and such decree could not be based on the testimony of a single witness; it appearing that the testimony was adequate to support the decree, though more than one witness, or one witness corroborated by circumstances equivalent in weight to another witness, be deemed required.—Id.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

⇐⇒392 (U.S.C.C.A.Mich.) Application for rehearing was addressed to the sound discretion of the trial judge, a discretion not reviewable on appeal, in the absence of a showing of its abuse.—Escanaba Traction Co. v. Burns, 48.

X. DECREE AND ENFORCEMENT THEREOF.

⇐⇒422 (U.S.C.C.A.Wis.) A decree may be final both as to the merits and to the time relation; but, where a chancellor denies a petition for a rehearing, it may be the final judicial action in the case despite an earlier decree on the merits which otherwise was final, the final order bringing forward to the time thereof the original decree on the merits.—National Brake & Electric Co. v. Christensen, 600.

⇐⇒436 (U.S.C.C.A.W.Va.) A release given by a commissioner on order of the court covering a parcel of land, title to which was in dispute in a suit for the purchase price, has the effect of a quitclaim deed under Code W. Va. 1913, c. 72, § 3 (sec. 3780).—Huntington v. Dickinson, 447.

EQUITY RULES.

See Court Rules Cited.

ERROR, WRIT OF.

See Appeal and Error.

ESCAPE.

See Collision, ⇐⇒96.

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ESPIONAGE ACT.

See Army and Navy, ⊂⊃40; Constitutional Law, ⊂⊃90; Criminal Law, ⊂⊃338, 657, 778; War, ⊂⊃4; Witnesses, ⊂⊃414.

ESTATES.

See Bankruptcy, ⊂⊃440; Executors and Administrators; Wills.

ESTOPPEL.

See Contracts, ⊂⊃323; Judgment, ⊂⊃678; Sunday, ⊂⊃15.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

⊂⊃52 (U.S.C.C.A.Okl.) Two of the indispensable elements of an estoppel in pais are that (1) the party claiming estoppel relied upon the action of the party estopped, and was thereby induced to change his position or course, and that (2) he has been or will be injured on account of that change, if the party estopped is permitted to pursue the course or have the relief he seeks.—Rader v. Star Mill & Elevator Co., 541.

⊂⊃54 (U.S.C.C.A.Mich.) Where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.—Fellows v. National Can Co., 120.

(B) Grounds of Estoppel.

⊂⊃70(2) (U.S.C.C.A.Mich.) Where a lease of machines for a term of years, subject to their return at any time by lessee, provided for payment of rental monthly on a royalty basis, but contained a plain and unambiguous provision fixing a minimum annual rental for each machine, and each party had a copy of the contract, neither the failure to demand the annual minimum at the end of each year, nor the acceptance of monthly rentals thereafter, estopped lessor to demand the deficiency on termination of the contract by lessee.—Fellows v. National Can Co., 120.

(C) Persons Affected.

⊂⊃98(1) (U.S.C.C.A.Okl.) A stockholder of a corporation, who held a valid vendor's lien on its real estate, *held* not estopped by the fact that he was a stockholder from asserting such lien as against a void mortgage, which the corporation attempted to make without his knowledge.—Rader v. Star Mill & Elevator Co., 541.

EVIDENCE.

See Criminal Law, ⊂⊃338–552; Equity, ⊂⊃345; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Trial, ⊂⊃85.

I. JUDICIAL NOTICE.

⊂⊃23(1) (U.S.C.C.A.Ill.) On petition to have a cease and desist order issued by the Federal Trade Commission vacated on the ground that the unfair practices of petitioner which related to sales of sugar, etc., had ceased, the court will take judicial notice of the government's control of the sale and consumption of sugar during the war, which, temporarily at least, put an end to the objectionable practice.—Sears, Roebuck & Co. v. Federal Trade Commission, 323.

VII. ADMISSIONS.

(D) By Agents or Other Representatives.

⊂⊃245 (U.S.C.C.A.Ohio) In an action against a contracting company, which was building a breakwater for the government, evidence that the government engineer in charge of the work, after the accident, stated that the government was maintaining a light on the end of the breakwater for the accommodation of the defendant, is admissible only for the purpose of impeaching the testimony of the government engineer that the section of the breakwater against which the vessel collided had been accepted by the government, etc.—Williams v. Edward Gillen Dock, Dredge & Construction Co., 531.

X. DOCUMENTARY EVIDENCE.

(C) Private Writings and Publications.

⊂⊃355(1) (U.S.C.C.A.Ariz.) In action to recover for failure to furnish live stock cars, a written statement of freight rates delivered to plaintiffs by defendant's agent and prepared by clerk in agent's office is admissible, although not actually prepared by agent himself.—Southern Pac. Co. v. Stevens, 233.

⊂⊃357 (U.S.C.C.A.Ariz.) In action for failure to furnish live stock cars, plaintiffs' telegrams and letter to defendant demanding cars and threatening to hold it liable for damages, etc., *held* admissible.—Southern Pac. Co. v. Stevens, 233.

(D) Production, Authentication, and Effect.

⊂⊃368(1) (U.S.C.C.A.Ark.) District Court has authority to require parties who are officers of an organization, as such officers, to produce books and records of the organization.—United Mine Workers of America v. Coronado Coal Co., 549.

⊂⊃373(2) (U.S.C.C.A.Ark.) Records of a labor organization, containing printed reports of conferences between representatives of the organization and of employers, stenographically taken, and the correctness of which was testified to by officers of the organization and conferees, *held* sufficiently authenticated to be admissible in evidence.—United Mine Workers of America v. Coronado Coal Co., 549.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

⊂⊃394 (U.S.C.C.A.Fla.) Plain terms of contract between shipowners and charters embodied in the charter party are not subject to be modified by evidence of communications by telephone and telegraph between the charterers and ship brokers with reference to the chartering of the vessel.—The Addison E. Bullard, 248.

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⇐419(1) (U.S.C.C.A.Alaska) Although plaintiff executed a receipt reciting payment of part of the consideration by the holder of an option to purchase a mining claim, parol evidence is admissible to show that the consideration named was not paid, but that he received a note or assignment from defendant and his oral promise to pay balance.—Cascaden v. Bell, 76.

(D) Construction or Application of Language of Written Instrument.

⇐461(1) (U.S.C.C.A.Alaska) Although plaintiff executed a receipt reciting payment of part of the consideration by the holder of an option to purchase a mining claim, parol evidence is admissible to show that the consideration named was not paid, but that he received a note or assignment from defendant and his oral promise to pay balance, and that the intention was to reduce the sum payable under the option.—Cascaden v. Bell, 76.

EXECUTION.

See Judgment, ⇐531.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

⇐222(1) (U.S.C.C.A.Ariz.) Under Civ. Code Ariz. 1901, par. 2570, providing that "real property taken in execution shall be sold at the courthouse door of the county wherein situated between the hours of ten o'clock a. m. and four o'clock p. m.," notice of a sale "between the legal hours" on a date named *held* sufficient.—Norma Mining Co. v. Mackay, 634.

EXECUTIVE POWER.

See Constitutional Law, ⇐80.

EXECUTORS AND ADMINISTRATORS.

See Appeal and Error, ⇐334; Death, ⇐31; Frauds, Statute of, ⇐34; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⇐22(2) (U.S.C.C.A.N.J.) Code Civ. Proc. N. Y. § 2559 et seq., authorizing appointment of an administrator with limited letters, "where a right of action is granted to an executor or administrator by special provision of law," is not limited to cases where the right of action is given by the law of New York.—Public Service Electric Co. v. Post, 83.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

⇐524(2) (U.S.C.C.A.N.Y.) Foreign executors, who have filed papers required by Code Civ. Proc. N. Y. § 1836a, may sue in a federal court in New York to recover funds of the estate.—Provident Life & Trust Co. v. Fletcher, 523.

Code Civ. Proc. N. Y. § 1836a, requiring foreign executors to file copies of letters, is a condition subsequent to suit, and may be complied with at such time as court permits.—Id.

EXEMPTIONS.

See Army and Navy, ⇐20; Habeas Corpus, ⇐16.

FALSE ENTRIES.

See Indictment and Information, ⇐125.

FEDERAL RESERVE ACT.

See Taxation, ⇐11.

FEDERAL TRADE COMMISSION.

See Constitutional Law, ⇐62, 80; Evidence, ⇐23; Trade-Marks and Trade-Names, ⇐80½.

FENCES.

See Negligence, ⇐51.

FERÆ NATURÆ.

See Fish, ⇐1.

FERRIES.

See Collision, ⇐102.

FINES.

See Bankruptcy, ⇐315, 317.

FISH.

See Trespass, ⇐11.

⇐1 (U.S.C.C.A.Mo.) In view of Rev. St. Mo. 1909, § 6508, declaring that title to all "birds, fish, and game" shall be in the state, and one taking or killing them shall be deemed to have consented that title thereto shall so remain for the purpose of regulation and control, and section 6551, prohibiting pearl fishing at certain times, title to fresh-water mussels, taken from a nonnavigable river could not be acquired by the owner of the bed of the stream, so as to support an action for the value of the shells; the mussels being animals feræ naturæ, title to which remained in the state, the term "fish" including shellfish, and "pearl fishing" referring to the capture of fresh-water mussels.—Gratz v. McKee, 351.

FOG.

See Collision, ⇐83.

FOOD.

See Evidence, ⇐23.

FOREIGN CORPORATIONS.

See Corporations, ⇐661–673.

FORFEITURES.

See Bail, ⇐75, 79; Conspiracy, ⇐19; Public Lands, ⇐120.

FORGERY.

See Assignments, ⇐43.

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FORMER JEOPARDY.

See Criminal Law, ⇐195.

FRANCHISES.

See Carriers, ⇐211.

FRAUD.

See Action, ⇐22, 50; Banks and Banking, ⇐257; Conspiracy, ⇐37; Corporations, ⇐320, 369; Criminal Law, ⇐876½; Election of Remedies, ⇐3; Frauds, Statute of; Indictment and Information, ⇐171; Jury, ⇐16, 31; Mines and Minerals, ⇐45; Payment, ⇐82, 89; Public Lands, ⇐120; Removal of Causes, ⇐116; Trade-Marks and Trade-Names, ⇐66, 69, 85, 93; War, ⇐4; Wills, ⇐743.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

⇐3 (U.S.C.C.A.Ill.) Liability for damages in an action for fraud is not created solely by the presence of a fraudulent intent, but there must have been false representations made with intent to deceive, and they must have been material, made to induce action, and relied upon and acted upon to the injury of the party claiming damages.—Plunkett v. Levengston, 609.

FRAUDS, STATUTE OF.

See Pleading, ⇐258.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER.

⇐18(2) (U.S.C.C.A.Ohio) The statute of frauds (Gen. Code Ohio, § 8621), relating to promises to answer for the debt or default of another, does not apply to a promise for a consideration made to the debtor to pay his debt.—Cincinnati Traction Co. v. Cole, 237.

⇐33(1) (U.S.C.C.A.Ohio) Notwithstanding the statute of frauds (Gen. Code Ohio, § 8621), declaring that no action shall be brought on a promise to answer for the debt, default, or miscarriage of another, unless the agreement is in writing, etc., an oral promise to answer for the debt or default of another is enforceable, where the leading object of the promisor was, not to answer for the debt of another, but to subserve some pecuniary or business purpose of his own.—Cincinnati Traction Co. v. Cole, 237.

⇐33(2) (U.S.C.C.A.Alaska) Where defendant, to protect his interest in a mining claim from relocation by the holder of an option to purchase plaintiff's claim, agreed that, if plaintiff would reduce the price, he would make up the same, such agreement, though oral, was not within the statute of frauds, for, whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary purpose of his own, the promise, though it may be in form a promise to pay the debt of another, is not within the statute.—Cascaden v. Bell, 76.

⇐34 (U.S.C.C.A.Ohio) As the first section of the original statute of frauds provides that no action shall be brought to charge any executor or administrator upon any special promise to answer damages on his own estate, etc., the second section, appearing as Gen. Code Ohio, § 8621, and declaring that no action shall be maintained on a promise to answer for the debt or default of another, unless in writing, etc., does not apply to a promise to answer for the debt of a third person out of such person's funds in the promisor's hands.—Cincinnati Traction Co. v. Cole, 237.

Where a contractor had nearly completed extensive work for defendant, and defendant had retained a large sum already earned, *held*, that a promise by defendant to pay a lumber company the amount which the contractor owed, by which means the company was induced to furnish more lumber and failed to perfect its lien, though oral, is enforceable, despite the statute of frauds (Gen. Code Ohio, § 8621); it being not only a promise for the benefit of defendant, but a promise to pay the debt out of funds of the contractor.—Id.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR OR DURING LIFETIME.

⇐49 (U.S.C.C.A.Alaska) Defendant's agreement that, if plaintiff would reduce the price of a mining claim in favor of the holder of an option to purchase, defendant would pay to plaintiff the amount of the reduction, as soon as the holder of the option paid a debt due to defendant, though oral, was not within the statute of frauds, as one not to be performed within a year, as payment might be made immediately.—Cascaden v. Bell, 76.

IX. OPERATION AND EFFECT OF STATUTE.

⇐120 (U.S.C.C.A.N.Y.) In an action against a Michigan corporation for breach of contract to lease for a term of years property located in New York, the New York statute of frauds (Real Property Laws, § 259), which does not require an agent who signs a written memorandum to be authorized in writing, applies, instead of the Michigan statute of frauds, which requires the agent to be authorized in writing; this being so notwithstanding both the New York and Michigan statute of frauds declare a contract not evidenced by a written memorandum to be void, instead of providing, as did the original statute, that no action should be maintained thereon, in which case it was held that the law of the forum applied.—Hotel Woodward Co. v. Ford Motor Co., 338.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⇐159 (U.S.C.C.A.N.Y.) In an action against a Michigan corporation for breach of a contract to lease New York property for a term of years, the question whether the attorney and agent of the Michigan corporation who executed the written memorandum relied upon by plaintiff was authorized to do so, *held*, under the evidence, for the jury.—Hotel Woodward Co. v. Ford Motor Co., 338.

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FRAUDULENT CONVEYANCES.

See Bankruptcy, ⇐165.

FREEDOM OF SPEECH.

See War, ⇐4.

GAME.

See Fish.

HABEAS CORPUS.

See Aliens, ⇐32.

I. NATURE AND GROUNDS OF REMEDY.

⇐16 (U.S.C.C.A.Md.) On proof that investigation by an exemption board has not been fair, or that it has abused its discretion by a finding contrary to all the substantial evidence, relief should be given under writ of habeas corpus.—Arbitman v. Woodside, 457.

HALF WAGES.

See Constitutional Law, ⇐275; Seamen, ⇐1.

HARD LABOR.

See Criminal Law, ⇐991.

HARMLESS ERROR.

See Appeal and Error, ⇐1047–1070; Criminal Law, ⇐1165–1174.

HARRISON NARCOTIC ACT.

See Criminal Law, ⇐371, 815, 1186; Poisons, ⇐2, 4, 9.

HOLIDAYS.

See Sunday.

HUSBAND AND WIFE.

See Bankruptcy, ⇐165; Searches and Seizures, ⇐7; Witnesses, ⇐52, 298.

IMMIGRATION.

See Aliens, ⇐51–54.

IMPROVEMENTS.

See Municipal Corporations, ⇐374.

INCOME TAX.

See Internal Revenue, ⇐4, 7; Statutes, ⇐219.

INDEMNITY.

See Appeal and Error, ⇐1241.

INDICTMENT AND INFORMATION.

See Army and Navy, ⇐40; Banks and Banking, ⇐257; Conspiracy, ⇐19, 37, 43; Corporations, ⇐369; Criminal Law, ⇐59, 319, 371, 876½, 1186; Perjury, ⇐29; Receiving Stolen Goods, ⇐7; War, ⇐4.

I. NECESSITY OF INDICTMENT OR PRESENTMENT.

⇐4 (U.S.C.C.A.Cal.) Accusation for a misdemeanor committed against the laws of the United States may properly be by information.—Blanc v. U. S., 641.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

⇐117 (U.S.C.C.A.Ill.) The rule that inferences are to be taken against the pleader does not extend to imagining inferences that are contrary to the fair common-sense reading of the averments.—Meyer v. U. S., 280.

⇐119 (U.S.C.C.A.Ill.) The unessential quoted words of an indictment, that the three defendants had conspired "with other persons to the grand jury unknown," may be ignored; there being no evidence of there having been more than the three conspirators.—Meyer v. U. S., 280.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

⇐124(6) (U.S.C.C.A.Ohio) Under Criminal Code, § 332 (Comp. St. § 10506), making aiders and abettors principals, one formerly known as an accessory may be charged as a principal, without joining the principal offender.—Kelly v. U. S., 408.

⇐125(19) (U. S. C. C. A. Ark.) An indictment against an officer of a national bank, under Rev. St. § 5209 (Comp. St. § 9772), for making a false entry in a report, is not duplicitous because it charges that the entry was made with intent to injure and defraud the bank and to deceive the Comptroller of the Currency and any agent appointed to examine the affairs of the bank.—Boone v. U. S., 113.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

⇐139 (U.S.C.C.A.N.Y.) A motion to quash an indictment on the ground that it does not charge facts sufficient to constitute an offense may be made at any time, even after verdict.—Cohn v. U. S., 371.

VIII. AMENDMENT.

⇐159(2) (U.S.C.C.A.N.Y.) Trial court's action in striking certain words in a count on motion by government, to which defendant made no objection, constitutes error fatal to a conviction on that count.—Dodge v. U. S., 316.

IX. ISSUES, PROOF, AND VARIANCE.

⇐171 (U.S.C.C.A.Ohio) Conspiracy alleged may fail in proof, as well as proved conspiracy may fail in execution; hence failure to prove the existence of a conspiracy alleged to have been formed to defraud the United States cannot affect the right, regardless of conspiracy, to prove that the fraud which was the alleged object of the conspiracy was actually committed.—Kelly v. U. S., 408.

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XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AIDER BY VERDICT.

⊂⊃202(2) (U.S.C.C.A.Cal.) A defendant, who waits until after verdict before making objection to the sufficiency of the indictment, waives all objections which run to the mere form in which the various elements of the crime are stated.—Shilter v. U. S., 12.

⊂⊃202(5) (U.S.C.C.A.Cal.) A defendant who waits until after verdict before making objection to the sufficiency of the indictment, waives all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn; but defects in substance, or failure of the indictment to state facts to constitute an offense, are not cured by verdict.—Shilter v. U. S., 12.

INFANTS.

See Negligence, ⊂⊃51.

INFRINGEMENT.

See Trade-Marks and Trade-Names, ⊂⊃62.

INJUNCTION.

See Appeal and Error, ⊂⊃100, 339; Corporations, ⊂⊃320; Courts, ⊂⊃317; Evidence, ⊂⊃23; Judgment, ⊂⊃407, 708; Patents, ⊂⊃317, 323, 327; Perjury, ⊂⊃9; Railroads, ⊂⊃54; Receivers, ⊂⊃77; Trade-Marks and Trade-Names, ⊂⊃66, 67, 69, 70, 80½, 93, 97.

II. SUBJECTS OF PROTECTION AND RELIEF.

(B) Property, Conveyances, and Incumbrances.

⊂⊃56 (U.S.C.C.A.Ohio) Secret formulas and processes are property rights, which will be protected by injunction, not only as against those who attempt to disclose or use them in violation of confidential relations or contracts, express or implied, but against those participating in the attempt with knowledge of such relations or contracts, though they might in time have reached the same result by independent efforts.—Herold v. Herold China & Pottery Co., 61.

(G) Personal Rights and Duties.

⊂⊃101(3) (U.S.C.C.A.Cal.) Where the contracts of employment between an electric railroad company, in part engaged in transporting war material and munitions workers, and its employés, provided that employés shall not be members of a labor union, and the grand officers of certain railroad brotherhoods attempted to unionize such employés and order a strike, not by recommending or advising or persuading the members to breach their contract in which they were engaged by any peaceful or lawful means, but by threats, opprobrious epithets, and insults to such an extent that it became necessary for the Commanding Officer of the United States submarine base in the neighborhood to give proper warning against interference with traffic, and to station naval guards on each car, a bill for an injunction will lie, in view of Act Oct. 15, 1914.—Montgomery v. Pacific Electric Ry. Co., 398.

III. ACTIONS FOR INJUNCTIONS.

⊂⊃114(3) (U.S.C.C.A.Ohio) To a suit by a corporation against another corporation and its striking employés, to enjoin the latter from interfering with its business and present employés, the defendant corporation is an indispensable party; its rights as against those of its codefendants being necessarily involved.—Iron Molders' Union, Local No. 68, v. Niles-Bement-Pond Co., 424.

⊂⊃128 (U.S.C.C.A.Ohio) In suit by a pottery company to enjoin use of its trade secrets and processes by defendant, its former manager and a competing company, evidence as to disclosure of trade secrets and processes by the manager *held* insufficient to sustain decree for plaintiff; there having been no disclosure in evidence of what each party claimed as a trade secret.—Herold v. Herold China & Pottery Co., 61.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

⊂⊃157 (U.S.C.C.A.Mo.) In suit to marshal the assets of a railway company and distribute them, and for injunction restraining the company and others from interfering with, transferring, etc., any part of the railroad's assets, wherein receiver was appointed, order directing payment of interest by receiver on certain notes held by banks, and also enjoining such payees from selling or attempting to sell any collateral securing the notes, *held* irregular and invalid, as not conforming to Comp. St. § 1243a, or to new equity rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix).—Mississippi Valley Trust Co. v. Railway Steel Spring Co., 362.

(B) Continuing, Modifying, Vacating, or Dissolving.

⊂⊃163(1) (U.S.C.C.A.Mo.) Order denying trust company's petition to dissolve preliminary injunction restraining it from disposing of collateral securing notes of railroad, whose assets a steel spring company was seeking to marshal and have distributed, a receiver having been appointed, *held* not necessarily erroneous, despite irregularities in the order to the receiver to pay interest on the notes, which order embodied the preliminary injunction.—Mississippi Valley Trust Co. v. Railway Steel Spring Co., 362.

⊂⊃175 (U.S.C.C.A.Mo.) It is well-recognized practice, on application for dissolution of restraining orders or preliminary injunctions on the ground of irregularities, to deny such petition if at the time of the hearing the court is of opinion such restraining order or preliminary injunction should issue, in view of all the facts and circumstances then existing.—Mississippi Valley Trust Co. v. Railway Steel Spring Co., 362.

INSANE PERSONS.

See Insurance, ⊂⊃446.

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INSOLVENCY.

See Bankruptcy; Receivers, ⇐157.

INSPECTION.

See Aliens, ⇐51; Carriers, ⇐211; Corporations, ⇐320.

INSTRUCTIONS.

See Criminal Law, ⇐778–844; Trial, ⇐193–211.

INSURANCE.

See Internal Revenue, ⇐7; Limitation of Actions, ⇐28; Payment, ⇐89; Usury, ⇐37.

V. THE CONTRACT IN GENERAL.

(B) Construction and Operation.

⇐146(3) (U.S.C.C.A.Tenn.) Where, under a fire policy, it was questionable whether the insurer was entitled to the additional premium claimed, the provisions creating an ambiguity, insurer has the burden of explaining the same. —Hanson v. Royal Ins. Co., 3.

⇐177 (U.S.C.C.A.Tenn.) Where fire policy provided that if at the expiration of the policy, or if it should be canceled by the assured, the average time cotton under liability has been at risk shall exceed two days, the assured should pay an additional premium, and the insurer treated the policy at an end because the receiver was appointed for the assured, the insurer's claim to the additional premium can be sustained only on the ground that the receivership was equivalent to a cancellation of the policy by the assured; the term "expiration" in such a contract meaning expiration by lapse of time. —Hanson v. Royal Ins. Co., 3.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

⇐232 (U.S.C.C.A.Tenn.) Where a fire policy provided that it should be void if any change other than by death of assured should take place in the interest, title, or possession of the subject of the insurance, and on a receiver being appointed for the assured the insurer declared the policy void, *held*, that such termination of the policy did not amount to a cancellation of the policy by the assured, so as to entitle the insurer to certain additional premiums. —Hanson v. Royal Ins. Co., 3.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(A) Grounds in General.

⇐255 (U.S.C.C.A.N.Y.) Where the underwriter requests information in the application which, when given, amounts to a representation, such answer to a specific question is conclusively presumed to be material to the risk.—Snare & Triest Co. v. St. Paul Fire & Marine Ins. Co., 441.

⇐265 (U.S.C.C.A.N.Y.) A statement in an application for a marine policy on a vessel, "warranted docked and overhauled," not carried into the policy, is a representation only, and in an action at law on the policy may be shown to have been substantially performed.—Snare & Triest Co. v. St. Paul Fire & Marine Ins. Co., 441.

(B) Matters Relating to Property or Interest Insured.

⇐272 (U.S.C.C.A.N.Y.) The word "docked," as used in application for marine insurance, *held* not to be ambiguous, but to mean dry-docked.—Snare & Triest Co. v. St. Paul Fire & Marine Ins. Co., 441.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

⇐312 (U.S.C.C.A.N.Y.) A representation in an application for insurance on a vessel during a voyage, that she will be dry-docked and overhauled before the voyage, is promissory, and a substantial compliance with it is sufficient to sustain the contract.—Snare & Triest Co. v. St. Paul Fire & Marine Ins. Co., 441.

A representation in the application for a marine policy that the vessel would be dry-docked and overhauled before the voyage may be shown to have been substantially complied with by proof, which warrants a finding that, while not dry-docked, she was made entirely seaworthy, and was in as good condition as she would have been made if dry-docked.—Id.

XII. RISKS AND CAUSES OF LOSS.

(D) Life Insurance.

⇐446 (U.S.C.C.A.Wash.) An exception from liability for death by "suicide, sane or insane," in a life policy includes self-destruction irrespective of the assured's mental condition at the time of the act.—United States Fidelity & Guaranty Co. v. Blum, 617; Penn. Mut. Life Ins. Co. v. Blum, 621.

INSURRECTION.

See Army and Navy, ⇐40; War, ⇐4; Witnesses, ⇐414.

INTENT.

See Fraud, ⇐3.

INTEREST.

See Damages, ⇐69; Injunction, ⇐157, 163; Internal Revenue, ⇐7; Usury.

II. RATE.

⇐37(1) (U.S.C.C.A.N.Y.) An agreement to pay interest at a specified rate "to the date of payment of the amount" means to the date of actual payment, and not to the date when payment should have been made and the contract rate governs to the date of entry of judgment or decree in equity for the amount.—Agency of Canadian Car & Foundry Co. v. American Can Co., 379.

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III. TIME AND COMPUTATION.

⇐46(1) (U.S.C.C.A.N.Y.) Where different claimants to an admitted indebtedness of defendant made a valid settlement of their differences, fixing the part due each, which settlement defendant refused to recognize, in the absence of any agreement respecting interest, defendant *held* chargeable with interest at the legal rate from the date of demand after the settlement.—Agency of Canadian Car & Foundry Co. v. American Can Co., 379.

INTERNAL REVENUE.

See Poisons, ⇐2, 4, 9; Receivers, ⇐77; Statutes, ⇐219.

⇐4 (U.S.C.C.A.Ohio) In case of ambiguity in the Income Tax Act of 1913, the language is to be construed most strongly in favor of the taxpayer.—U. S. v. Coulby, 165.

⇐4 (U.S.C.C.A.Pa.) In construing Act Sept. 8, 1916, tit. 3, § 301 (Comp. St. § 6336¼b), the court must put himself in the position of Congress when it enacted the law, and from the circumstances and surroundings then existing, and the general purpose then in view, ascertain what was meant to be done.—Carbon Steel Co. v. Lewellyn, 473.

⇐7 (U.S.C.C.A.N.Y.) A trustee of a bankrupt corporation, who is not carrying on its business, but has received funds as a result of a compromise made by him with a foreign corporation of a claim for nonpayment of salary and commissions, is not liable to pay an income tax under Act Sept. 8, 1916, § 13(c), being Comp. St. § 6336m, since under such section only net income earned by a trustee while operating the business of a bankrupt corporation is taxable.—In re Heller, Hirsh & Co., 276.

⇐7 (U.S.C.C.A.Ohio) Under Income Tax Law 1913, a member of a partnership need not include as part of his net income, subject to tax, funds derived from or through the partnership, which has been received by the firm as dividends on stocks owned by it in corporations taxable on their net income.—U. S. v. Coulby, 165.

⇐7 (U.S.C.C.A.Or.) Where, in 1907, the owner of land leased the same for 23 years, under an agreement requiring the tenant to construct an expensive brick building, and on the tenant's default the owner retook possession in 1916, the value of the building cannot be deemed income accruing in the year 1917, within Income Tax Law Sept. 8, 1916, § 2a (Comp. St. § 6336b), for under the lease the title to the building vested in the owner immediately upon construction, and the lessee's default caused the owner a loss.—Miller v. Gearin, 293.

Where an income tax law is doubtful, doubts should be resolved in favor of the taxpayer against the government.—Id.

⇐7 (U.S.C.C.A.Pa.) The proviso in Income Tax Act Oct. 3, 1913, § 2, G (b), that in computing gross income "life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to such individual policy holder, or treated as an abatement or premium of such individual policy holder within such year," treats policy holders individually and separately, and not in mass, and a company may not exclude from its income a dividend paid to a policy holder, even though for redundancies in premiums previously paid, unless it has received premiums from him during the tax year, and then only to the extent of the amount of premiums so received from him, either actually or theoretically.—Lederer v. Penn Mut. Life Ins. Co., 167.

So-called dividends paid to policy holders by a mutual level premium life insurance company, consisting of excess premiums collected, are covered by the noninclusion clause of Income Tax Act Oct. 3, 1913, § 2, G (b), and may not be deducted from gross income in ascertaining net income under the deduction clause, as sums paid on "policy * * * contracts."—Id.

Interest on redundancies of premiums for previous years, paid by a policy holder in a life insurance company and allowed to remain with the company under the contract, when paid to the policy holder, constitutes a "dividend," within the meaning of Income Tax Act Oct. 3, 1913, § 2, G (b), providing for deduction from gross income of "the sums other than dividends paid within the year on policy * * * contracts," and may not be deducted thereunder.—Id.

Under life insurance policies providing for payment to the beneficiaries in installments on death of insured, and for interest on deferred installments, interest so paid is not a dividend, but a "sum other than dividends paid * * * on policy * * * contracts," and deductible by the company from gross income, under Income Tax Act Oct. 3, 1913, § 2, G (b).—Id.

⇐9 (U.S.C.C.A.Pa.) A steel company, contracting to deliver shells to a foreign government, which manufactured in its own plant bars for which shells were made, and turned them over to subcontractors for completion, retaining ownership and control of the work, and afterwards delivering shells under its contract, realizing a net profit, was "manufacturing shells," and therefore subject to the tax imposed by Act Sept. 8, 1916, "making" being manufacturing.—Carbon Steel Co. v. Lewellyn, 473.

A company which contracted with another company, having a contract with a foreign government, to sell and deliver high explosive shells, to furnish the steel, and complete six of the initial steps, representing about 40 per cent. of cost of shells, *held* "a person manufacturing * * * shells * * * or any part of any of the articles mentioned," and to be subject to the tax imposed by Act Sept. 8, 1916.—Id.

A subcontractor which agreed with contractor, having contract with a foreign government to supply high explosive shells, to furnish to contractor rough steel shell forgings, and which to fulfill its contract made, had made, or bought in the market steel required, *held* "a person manufacturing * * * shells * * * or any part," thereof and to be subject to the tax imposed by Act Sept. 8, 1916.—Id.

⇐11 (U.S.C.C.A.Pa.) The broad general purpose of Act Sept. 8, 1916, was to include in the field of taxation all such specified articles or parts thereof as were either made for war purposes, or were withdrawn from the general field of commerce and used for the making of war articles.—Carbon Steel Co. v. Lewellyn, 473.

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INTERNATIONAL LAW.

See Admiralty, ⇐72; Constitutional Law, ⇐68.

⇐9 (U.S.C.C.A.N.Y.) The rights and liabilities of a state are not affected by a change in the form or the personnel of its government, however accomplished.—Agency of Canadian Car & Foundry Co. v. American Can Co., 379.

⇐10 (U.S.C.C.A.Pa.) On principles of international comity, a United States court is bound to accept a suggestion of the British ambassador that the British government requisitioned a certain British ship at a certain time.—The Adriatic, 622.

A United States court, in a libel against a British ship, on suggestion by the British ambassador, appearing as amicus curiæ, that the ship has been duly requisitioned by the British government, is not at liberty to consider the question of the validity of the requisition, or to consider a claim by libelant, alleging breach of a charter party, that the British government did not have power to requisition the vessel, because the vessel at the time was on the high seas.—Id.

INTERVENTION.

See Bankruptcy, ⇐88.

INTOXICATING LIQUORS.

VIII. CRIMINAL PROSECUTIONS.

⇐236(1) (U.S.C.C.A.S.C.) Evidence that witnesses found whisky, molasses, meal, and an iron pot containing liquid which apparently had been boiled in defendants' house, etc., *held* to sustain a conviction for illicit distilling.—Smiling v. U. S., 301.

JOINT ADVENTURES.

See Trusts, ⇐110.

⇐4(1) (U.S.C.C.A.Alaska) Where complainant and defendant, joint adventurers, located a mining claim, and defendant, after erasing the name of complainant and substituting that of another, who disposed of a one-fourth interest to a bona fide purchaser, made discovery, *held* that, as the discovery by defendant inured to the benefit of both parties, and defendant's act alone made possible the conveyance of a one-fourth interest, complainant is entitled to recover a half interest in the claim.—Cascaden v. O'Connor, 80.

JUDGES.

See Criminal Law, ⇐864, 1174, 1186; Perjury, ⇐29.

JUDGMENT.

See Courts, ⇐366, 405; Equity, ⇐422–436; Execution; Sunday, ⇐15.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

⇐407(1) (U.S.C.C.A.N.D.) An injunction will not be granted to restrain enforcement of a judgment at suit of a third person, on the ground that he will be liable over to the defendant therein, where the matter alleged as basis for the injunction would be available to complainant as a defense in an action against him.—Simonitsch v. Bruce, 347.

⇐423 (U.S.C.C.A.N.D.) It is not ground for equitable interference with a judgment that the defendant by his own act or omission failed effectually to avail himself of a defense, or that the court decided questions of law or fact erroneously.—Simonitsch v. Bruce, 347.

⇐429 (U.S.C.C.A.N.D.) It is not ground for equitable interference with a judgment that the defendant by his own act or omission failed effectually to avail himself of a defense.—Simonitsch v. Bruce, 347.

XI. COLLATERAL ATTACK.

(A) Judgments Impeachable Collaterally.

⇐472 (U.S.C.C.A.Va.) A judgment of a federal District Court having jurisdiction of the subject-matter, the parties thereto being in fact citizens of different states, which has not been challenged by appeal or writ of error, is binding upon the parties and their privies until reversed or otherwise set aside, and is not open to collateral attack.—Miller v. Williams, 284.

XII. CONSTRUCTION AND OPERATION IN GENERAL.

⇐531 (U.S.C.C.A.Ky.) Where the decree did not run against plaintiff trustee in a representative capacity, he being styled therein "D. R. Howard, trustee," prima facie indicating the word "trustee" was merely descriptive, while the order for execution was directed against "D. R. Howard, trustee," was personally liable.—Howard v. Leete, 68.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(B) Persons Concluded.

⇐678(1) (U.S.C.C.A.Okl.) A decree against a corporation, which was subsequently adjudicated a bankrupt, establishing and foreclosing a vendor's lien on real estate, estops the bankrupt, its trustee, and general creditors from asserting or maintaining, not only every matter offered, but also every admissible matter that might have been offered, in the foreclosure suit to defeat the plaintiff's claim.—Rader v. Star Mill & Elevator Co., 541.

⇐684 (U.S.C.C.A.W.Va.) A judgment in a suit for the purchase money of land, allowing defendant therein credit for a parcel in dispute as for a deficiency, because of a recovery in ejectment by a third person against vendor's tenant, is not available as a finding that plaintiff had no such title as vendee was bound to accept, in a subsequent action to recover the disputed parcel, brought against those claiming under plaintiff in the ejectment suit.—Huntington v. Dickinson, 447.

⇐708 (U.S.C.C.A.Okl.) In an action against a city, based on its alleged neglect and refusal to make a reassessment of benefits to pay paving bonds, to supply the deficiency caused by its assessment of property which was not subject thereto, a judgment recovered against the city

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by the owner of such property, declaring the assessment invalid and enjoining its enforcement, *held* admissible in evidence.—Oklahoma City v. Orthwein, 258.

(C) Matters Concluded.

⇐713(1) (U.S.C.C.A.N.Y.) Findings of fact and law, stated in an order of a federal court directing its receiver for an electric railway company, operating under franchises from different municipalities, to apply to the state Public Service Commission for an increase of rates of fare, *held* not an adjudication binding upon the municipalities.—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., 14.

(D) Judgments in Particular Classes of Actions and Proceedings.

⇐747(1) (U.S.C.C.A.W.Va.) Under Code W. Va. 1913, c. 90, § 35 (sec. 4103), providing that a judgment in ejectment shall be conclusive as to the right of possession upon the party against whom rendered and all persons claiming from, through, or under him, by title accruing after commencing of suit, a judgment against the tenant, in an ejectment suit to which the landlord is not a party, does not affect the landlord's title.—Huntington v. Dickinson, 447.

JUDICIAL POWER.

See Constitutional Law, ⇐68.

JUDICIAL SALES.

See Execution, ⇐222.

JURY.

See Aliens, ⇐54; Appeal and Error, ⇐177; Criminal Law, ⇐864.

II. RIGHT TO TRIAL BY JURY.

⇐16(1) (U.S.C.C.A.Va.) In setting aside a fraudulent release of its own judgment, a law court is exercising equitable power, founded on its control of its own records or of its own processes, and a jury trial may not be demanded as of right.—Miller v. Williams, 284.

⇐31(1) (U.S.C.C.A.S.D.) For the court to permit a transfer of action at law for fraud in a sale to the equity docket is an error affecting the substantial right of defendant to a jury trial, requiring reversal.—Issenhuth v. Kirkpatrick, 309.

LABOR DISPUTES.

See Injunction, ⇐101.

LANDLORD AND TENANT.

See Frauds, Statute of, ⇐120; Internal Revenue, ⇐7; Judgment, ⇐684, 747; Pleading, ⇐258.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) Requisites and Validity.

⇐22(4) (U.S.C.C.A.N.Y.) In an action against a Michigan corporation for breach of an agreement to lease New York property for a term of years, the question whether the minds of the parties had met *held* for the jury.—Hotel Woodward Co. v. Ford Motor Co., 338.

LARCENY.

See Receiving Stolen Goods.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⇐1 (U.S.C.C.A.N.J.) In a prosecution for violating Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), making it a crime to steal, or unlawfully take, carry away, or conceal, etc., any goods or chattels moving as part of an interstate or foreign shipment, etc., the statute will be construed to apply to the case of a shipment from one point in the state to another point, where the route is in part without the state.—U. S. v. Moynihan, 469.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

⇐55 (U.S.C.C.A.N.J.) In a prosecution under Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), denouncing the offense of stealing, or unlawfully taking, carrying away, or concealing, or by fraud or deception obtaining from any railroad car, station house, or platform, depot, steamboat, vessel, or wharf, any goods or chattels moving as an interstate or foreign shipment, etc., where it appeared that a bale of silk was pushed from an express wagon, and it was claimed defendant attempted to place the silk in an automobile, etc., evidence *held* insufficient to show that the silk was stolen from any platform, etc.—U. S. v. Moynihan, 469.

LEASE.

See Landlord and Tenant.

LEGISLATIVE POWER.

See Constitutional Law, ⇐62.

LICENSES.

See Copyrights, ⇐50.

LIENS.

See Mortgages, ⇐151; Receivers, ⇐77; Shipping, ⇐49.

⇐22 (U.S.C.C.A.Okl.) The legal presumption is that one who has a legal and equitable lien on property intends to maintain and enforce it, and his abandonment thereof may not be adjudged without clear and convincing evidence of his intention to abandon.—Rader v. Star Mill & Elevator Co., 541.

LIFE ESTATES.

See Bankruptcy, ⇐440; Wills, ⇐607.

LIMITATION OF ACTIONS.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

⇐28(1) (U.S.C.C.A.Or.) An action to recover from an insurance company moneys repaid to it

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by plaintiff, because of threats of a committee of leading insurers that they would publish charges that the money had been fraudulently obtained, falls within the six-year period of limitation established by L. O. L. § 6, for actions upon contracts or liability express or implied, and not within the two-year period prescribed by section 8 for injuries not arising on contract.—Lipman, Wolfe & Co. v. Phœnix Assur. Co., 484.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

⇐46(6) (U.S.C.C.A.Mich.) Where a lease of machines for a term of years provided for monthly rental on a royalty basis, but fixed a minimum annual rental for each machine, without stating when any deficiency should be payable, a cause of action for such a deficiency arose on the lapse of a reasonable time after expiration of the year, and from that time limitation ran against an action therefor.—Fellows v. National Can Co., 120.

LIQUOR SELLING.

See Intoxicating Liquors.

LOGS AND LOGGING.

⇐3(11) (U.S.C.C.A.S.C.) A deed to standing timber, giving the grantee 10 years from the time of commencing to cut within which to cut and remove the timber, vests in the grantee a present estate in the timber trees, with the right to begin cutting within a reasonable time from the date of the deed.—Norfolk Bank for Savings & Trusts v. Whipple, 647.

⇐3(14) (U.S.C.C.A.S.C.) Failure of the grantee of standing timber to begin cutting the same within 14 years *held* to terminate his estate therein, where under his deed he was required to begin cutting within a reasonable time.—Norfolk Bank for Savings & Trusts v. Whipple, 647.

⇐8(1) (U.S.C.C.A.Vt.) A contract by plaintiff to cut as much wood as possible from certain lots of defendant, and deliver the same on the cars at a railroad station named, for a stated price per cord, defendant to furnish him provisions at cost during the work, *held* to require defendant to furnish the necessary cars.—American Realty Co. v. Curran, 204.

MAIL ORDER BUSINESS.

See Trade-Marks and Trade-Names, ⇐80½.

MANUFACTURES.

See Corporations, ⇐661; Internal Revenue, ⇐9.

MARITIME LIENS.

See Shipping, ⇐49.

MARSHALING ASSETS AND SECURITIES.

See Injunction, ⇐157, 163; Receivers, ⇐77.

MASTER AND SERVANT.

See Associations, ⇐19; Corporations, ⇐423; Injunction, ⇐101.

I. THE RELATION.

(B) Statutory Regulation.

⇐16½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⇐ number sections 346–420, at the end of this topic, where the matter in this and future index digests will be found.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

⇐87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⇐ number sections 346–420, at the end of this topic, where the matter in this and future index-digests will be found.

⇐94 (U.S.C.C.A.Ohio) Under Page & A. Gen. Code Supp. Ohio, § 6330—1, the employer of an operator of finishing rolls for sheet steel was liable for destruction of the health and sight of the operator, caused by the constant glare of strong light on the rolls he was required to inspect; the legal consequences of violating the statute not being limited to the penalty prescribed in section 6330—9.—Zajkowski v. American Steel & Wire Co., 147.

(D) Warning and Instructing Servant.

⇐150(2) (U.S.C.C.A.Ohio) Where an employer continues an employé for a substantial time in work under conditions which, in the absence of precautions, are calculated to engender disease, it is the employer's duty to warn and instruct the employé, and to furnish him with effective means to avoid the danger.—Zajkowski v. American Steel & Wire Co., 147.

(H) Actions.

⇐250¾. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⇐ number sections 346–420, at the end of this topic, where the matter in this and future index digests will be found.

⇐256(2) (U.S.C.C.A.Ohio) Petition of servant, employed in operation of finishing rolls for pressing sheets of steel, rendered blind and invalided in his employment, *held* to state facts constituting a cause of action for damages due to an occupational disease incident to work plaintiff was performing.—Zajkowski v. American Steel & Wire Co., 147.

⇐286(1) (U.S.C.C.A.Va.) In an action for injury to a brakeman, the questions of negligence and assumption of risk *held* properly submitted to the jury.—Virginian Ry. Co. v. Halstead, 444.

⇐286(15) (U.S.C.C.A.Va.) Where a brakeman, required in course of duty to mount the ladder on the side of a moving car, was injured by his foot being struck by a switch target six or seven inches from the passing ladder, proof that the construction of the switch was in accordance with the custom of railroads is evidence of

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due care, but not conclusive, and the court cannot hold as matter of law that so narrow a space was reasonably safe.—Virginian Ry. Co. v. Halstead, 444.

⇐288(1) (U.S.C.C.A.Va.) The question of a brakeman's assumption of risk *held* properly submitted to the jury.—Virginian Ry. Co. v. Halstead, 444.

VI. WORKMEN'S COMPENSATION ACTS.

(A) Nature and Grounds of Master's Liability.

⇐358 (U.S.C.C.A.Md.) A stevedore, injured while loading a vessel, who was entitled under Judicial Code, § 24, par. 3, as amended by Act Oct. 6, 1917, to the remedy afforded by the state Workmen's Compensation Act, *held* not to have elected that remedy by signing at the request of an attorney the notice to his employer contemplated by the Compensation Act, and to be entitled to sue in admiralty, etc.—Patapsco Ship Ceiling & Stevedore Co. v. Seibert, 134.

⇐376(2) (U.S.C.C.A.Ohio) In view of Const. Ohio, art. 2, as amended September 3, 1912, and in view of Page & A. Gen. Code Supp. Ohio, § 6330—1, the Workmen's Compensation Act of the state (103 Ohio Laws, p. 72, approved March 14, 1913) has no application to the case of an operator of sheet steel finishing rolls, blinded and invalided by the strong glare of powerful lights from the glittering surfaces he had to inspect, an occupational disease.—Zajkowski v. American Steel & Wire Co., 147.

MILITARY SERVICE.

See Army and Navy; Negligence, ⇐93; Railroads, ⇐350.

MINES AND MINERALS.

See Conspiracy, ⇐19, 21; Corporations, ⇐642, 673; Evidence, ⇐419, 461; Frauds, Statute of, ⇐33, 49; Joint Adventures, ⇐4; Shipping, ⇐108; Trusts, ⇐110.

I. PUBLIC MINERAL LANDS.

(B) Location and Acquisition of Claims.

⇐17(1) (U.S.C.C.A.S.D.) The words "discovery of the vein or lode," as used in Rev. St. § 2320 (Comp. St. § 4615), in prescribing the prerequisites of a valid mineral location, owing to the varying conditions to which the expression must be applied, has no rigidly fixed meaning.—U. S. v. Safe Investment Gold Mining Co., 592.

(C) Patents.

⇐45 (U.S.C.C.A.S.D.) Evidence in a suit for cancellation of a mineral patent for fraud *held* insufficient to overcome the presumption in favor of the validity of the patent, or to show that representations made in the application for patent were willfully and knowingly false, or that they were relied on by the government officers.—U. S. v. Safe Investment Gold Mining Co., 592.

MONEY RECEIVED.

⇐1 (U.S.C.C.A.Or.) Assumpsit for money had and received will lie in general, whenever defendant has received money which is the property of plaintiff, and which the defendant is obliged by natural justice and equity to return; it being unnecessary that there be an actual contractual relation.—Lipman, Wolfe & Co. v. Phœnix Assur. Co., 484.

MORTGAGES.

See Bankruptcy, ⇐184; Corporations, ⇐320; Receivers, ⇐157.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

⇐151(6) (U.S.C.C.A.Okl.) Under Rev. Laws Okl. 1910, § 3847, giving a vendor's lien for unpaid purchase money subject to the rights of purchasers and incumbrancers in good faith, the lien of a vendor to a corporation *held* not displaced by an agreement by the corporation, made before it obtained the deed and without the vendor's knowledge, to give a mortgage to another, who did not know nor inquire as to the condition of the title.—Rader v. Star Mill & Elevator Co., 541.

X. FORECLOSURE BY ACTION.

(J) Sale.

⇐510(3) (U.S.C.C.A.Ariz.) In a notice of the sale of property under foreclosure decree, a description of the property as given in the mortgage is sufficient.—Norma Mining Co. v. Mackay, 634.

⇐529(6) (U.S.C.C.A.Ariz.) Refusal of a district court to set aside a second sale of property under a foreclosure decree on the ground of inadequacy of price *held* not error.—Norma Mining Co. v. Mackay, 634.

MOTIONS.

See Indictment and Information, ⇐139.

MOVING PICTURES.

See Army and Navy, ⇐40; Copyrights, ⇐50.

MUNICIPAL CORPORATIONS.

See Appeal and Error, ⇐781; Army and Navy, ⇐40; Courts, ⇐107; Judgment, ⇐708, 713; Railroads, ⇐54; Taxation, ⇐11.

IX. PUBLIC IMPROVEMENTS.

(C) Contracts.

⇐374(1) (U.S.C.C.A.Okl.) Where a municipal corporation, which has power to make a contract for internal improvements, contracts for them and stipulates that the agreed price shall be paid out of funds to be realized from special assessments, which it has power to make, but fails and refuses to make sufficient valid assessments, it becomes primarily liable to pay the contract price itself.—Oklahoma City v. Orthwein, 258.

MUNITIONS.

See Ambassadors and Consuls, ⇐5½; Internal Revenue, ⇐9.

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MUSSELS.

See Trespass, ⇐11.

NAMES.

See Joint Adventures, ⇐4; Trusts, ⇐110.

NATIONAL BANKS.

See Banks and Banking, ⇐257.

NATIONAL CONSCRIPTION ACT.

See Army and Navy, ⇐20; Habeas Corpus, ⇐16; War, ⇐4.

NAVIGABLE WATERS.

See Wharves.

I. RIGHTS OF PUBLIC.

⇐19 (U.S.C.C.A.Ohio) Any one placing an obstruction such as a breakwater in a navigable lake outside of a much-used harbor is bound to exercise reasonable care for the safety of all persons making use of the harbor, and such duty requires the placing and maintaining of a suitable warning light at night.—Williams v. Edward Gillen Dock, Dredge & Construction Co., 531.

The United States government, which engaged a contractor to construct a breakwater outside the Cleveland harbor, *held* to have accepted the section of the breakwater already constructed, so that the contractor was not liable for the death of one on a vessel which struck the breakwater, due to the absence of warning lights.—Id.

NEGLIGENCE.

See Appeal and Error, ⇐1066; Carriers, ⇐211; Collision, ⇐17, 83, 95; Master and Servant, ⇐94–150; Railroads, ⇐350; Shipping, ⇐126; Towage, ⇐11; Wharves, ⇐20.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

⇐6 (U. S. C. C. A. Ohio) Where a statute, though penal in character, plainly imposes a duty for the benefit of a class of individuals, a right of action accrues to a person of such class, injured through breach of the duty.—Zajkowski v. American Steel & Wire Co., 147.

(C) Condition and Use of Land, Buildings, and Other Structures.

⇐32(1) (U.S.C.C.A.Pa.) A storekeeper does not insure the safety of customers, but must merely exercise reasonable care to keep premises in a safe condition for their proper use.—Kaufman Department Stores v. Cranston, 637.

A storekeeper is not liable to a customer, injured by tripping on a worn carpet, unless he knew, or should have known, of the defective condition in time to have repaired it, or warned the customer, or the general condition was such that he should have anticipated that it would become dangerous, unless repaired or replaced.—Id.

⇐51 (U.S.C.C.A.Vt.) Defendant *held* not chargeable with negligence in not maintaining a fence or barrier between a canal and a roadway alongside, both of which it owned, which rendered it liable for the death of a boy five years old, who when playing on the roadway, as was customary and known to defendant, threw a stick upon the ice in the canal, and again into a hole in the ice, and while attempting to recover it was drowned; there being no evidence that children played on the ice with defendant's knowledge.—National Metal Edge Box Co. v. Agostini, 195.

⇐55 (U.S.C.C.A.Ohio) After a contractor has turned over the work and it has been accepted by the owner, the contractor incurs no further liability to third persons; the responsibility for maintaining it and of giving notice or warning of dangers being then shifted to the owner.—Williams v. Edward Gillen Dock, Dredge & Construction Co., 531.

II. PROXIMATE CAUSE OF INJURY.

⇐62(1) (U.S.C.C.A.N.Y.) If there is an unbroken connection between the act and the injury, the act causes the injury, and an intervening act is not the proximate cause of the injury unless it is efficient to break the causal connection.—The Daniel McAllister, 489.

III. CONTRIBUTORY NEGLIGENCE.

(C) Imputed Negligence.

⇐93(1) (U.S.C.C.A.S.C.) The negligence of a sergeant, driving an army truck struck at a crossing, is not imputable to the soldiers riding in it; the sergeant running the truck at the command of the superior in one branch of the service, and the others being on the truck at the command of a superior in another branch of the service, so that they were not voluntarily riding together, and neither one having any authority over the other.—Charleston & W. C. R. Co. v. Alwang, 313.

IV. ACTIONS.

(C) Trial, Judgment, and Review.

⇐142 (U.S.C.C.A.Ala.) A finding by a jury of wanton negligence necessarily involves a finding of simple negligence.—Illinois Cent. R. Co. v. Beavers, 463.

NEW TRIAL.

See Appeal and Error, ⇐1178; Criminal Law, ⇐657.

NONSUIT.

See Dismissal and Nonsuit.

NOTICE.

See Execution, ⇐222; Mortgages, ⇐151, 510; Negligence, ⇐55; Pleading, ⇐258.

OATH.

See Criminal Law, ⇐1186; Equity, ⇐345; Perjury, ⇐29.

OBSCENITY.

See Post Office, ⇐32.

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OCCUPATIONAL DISEASES.

See Master and Servant, ⇐256, 376.

OFFICERS.

See Aliens, ⇐32; Banks and Banking, ⇐257; Corporations, ⇐398, 433; Evidence, ⇐368; Indictment and Information, ⇐125; Public Lands, ⇐106; Receivers.

PACKERS.

See Railroads, ⇐54.

PARENT AND CHILD.

See Wills, ⇐607.

PARTIES.

See Courts, ⇐317.

For parties to particular proceedings or instruments, see also the various specific topics.

For parties on appeal and review of rulings as to parties, see Appeal and Error.

PARTNERSHIP.

See Criminal Law, ⇐412; Internal Revenue, ⇐7.

PATENTS.

See Appeal and Error, ⇐339; Public Lands, ⇐120, 139; Trade-Marks and Trade-Names, ⇐11, 45.

II. PATENTABILITY.

(A) Invention.

⇐26(1) (U.S.C.C.A.Ohio) All elements of the prior art have a bearing on the question of invention, and it is unnecessary to a finding of lack of invention that every element can be found in one embodiment.—Edwards v. Dayton Mfg. Co., 130.

⇐26(2) (U.S.C.C.A.Ohio) Invention may exist, even though every element is old, provided the combination either produces a new result or effects an old result in a new and materially better way.—Edwards v. Dayton Mfg. Co., 130.

(D) Anticipation.

⇐51(1) (U.S.C.C.A.Del.) Though two arts, producing the same products from the same source, are concededly related, yet differences in them, if fundamental, may validly prevent inventions in one from operating as anticipations of inventions in the other.—Otto Coking Co. v. Koppers Co., 208.

VII. REISSUES.

⇐147 (U.S.C.C.A.N.Y.) The fact that some of the claims of a reissued patent are invalid, as too broad, does not invalidate other claims.—Vandenburgh v. Concrete Steel Co., 138.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Licenses and Contracts.

⇐216 (U.S.C.C.A.Mich.) In a contract for leasing solder-saving machines, providing for the payment as rental of one-third the saving of the machines each month, a provision immediately following, "but the minimum amount of rent or royalty paid in any calendar year, after the year in which the machines are installed, shall be $300 for each machine," *held* not ambiguous, and reasonable and valid; it being shown that, if a machine was continuously used, the royalty would much exceed such sum.—Fellows v. National Can Co., 120.

Contract for leasing of machines on royalty, with a fixed minimum annual rental for each machine, construed with respect to rental due on machines for the year in which they were returned under the contract.—Id.

XII. INFRINGEMENT.

(A) What Constitutes Infringement.

⇐226 (U.S.C.C.A.N.Y.) Infringement should not be determined by the mere decision that the terms of a claim of a valid patent are applicable to defendant's device, but the question involves considerations of practical utility and substantial identity, and that must be quantitative as well as qualitative.—Silver & Co. v. S. Sternau & Co., 464.

⇐240 (U.S.C.C.A.Del.) Infringement of a patented device cannot be avoided by merely improving it.—Otto Coking Co. v. Koppers Co., 208.

(C) Suits in Equity.

⇐317 (U.S.C.C.A.Ohio) Where the evidence warrants the conclusion that the infringement of patent involved in the construction and use of machines by defendant was purposeful and inexcusable, and committed under circumstances calculated to arouse just apprehension that it would be persisted in, the remedy is to be found in equity and injunction.—Miller Rubber Co. v. De Laski & Thropp Circular Woven Tire Co., 21.

⇐323 (U.S.C.C.A.Wis.) Where an alleged infringer was permanently enjoined and an accounting was directed before a master in chancery for past infringement and on appeal decree was affirmed, the decree, though interlocutory in form, was in its essence a "final decree."—National Brake & Electric Co. v. Christensen, 600.

⇐327 (U.S.C.C.A.Wis.) Where an alleged infringer was permanently enjoined and an accounting was directed before a master in chancery for past infringement, and on appeal decree was affirmed, the decree, though interlocutory in form, was in its essence a final decree, so that after affirmance and before accounting was had the infringer cannot by petition set up in the Circuit Court of Appeals as res judicata a judgment of another Circuit Court of Appeals in an action brought by the same complainants in another circuit holding the patent invalid.—National Brake & Electric Co. v. Christensen, 600.

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XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

⊂=328.

UNITED STATES.

ORIGINAL.

682,316. Studding and metal lath combination, held invalid..... 29
818,033. By-product coke ovens, claims 1 and 5, held valid, not anticipated, and infringed; held not to infringe patent No. 673,928, claim 1 208
836,526. Tank heater, held void..... 26
890,626. Window holding and fastening devices, held void..... 130
1,011,450. Tire-wrapping machine, claims 1, 2, 3, 4, 7, 8, 10, 11, 13, and 20, held infringed..... 21
1,149,858. Doll head, held not infringed... 227
1,199,257. Collapsible stove, limited, and held not infringed..... 464
1,229,432. Collapsible or knockdown stove, held void, and not infringed.. 464

REISSUED.

14,182. Concrete reinforcing bar, claims 1 and 2, held void; claims 3 and 5, held valid and infringed 138

PAYMENT.

See Action, ⊂=22; Appeal and Error, ⊂=1241; Attorney and Client, ⊂=98; Bankruptcy, ⊂=440; Damages, ⊂=82; Election of Remedies, ⊂=3; Estoppel, ⊂=70; Evidence, ⊂=419, 461; Frauds, Statute of, ⊂=33, 49; Injunction, ⊂=157, 163; Interest, ⊂=37; Judgment, ⊂=708; Municipal Corporations, ⊂=374; Receivers, ⊂=157; Shipping, ⊂=40; Subrogation.

V. RECOVERY OF PAYMENTS.

⊂=82(1) (U.S.C.C.A.Or.) One cannot recover money voluntarily paid with full knowledge of all the facts, although no obligation existed; but money may be recovered where paid under circumstances of fraud, misrepresentation, and threats amounting to duress, which prevents the free exercise of the will, or where it is paid on a wrongful demand to save the party paying from some great or irreparable mischief or damage, from which he could not otherwise be saved.—Lipman, Wolfe & Co. v. Phœnix Assur. Co., 484.

⊂=89(3) (U.S.C.C.A.Or.) Complaint seeking to recover from an insurance company an amount which the inexperienced officers of plaintiff corporation repaid to the company, when they were threatened by a committee of the leading insurers with publication of charges that the insurance money had been fraudulently obtained, etc., *held* to state a cause of action.—Lipman, Wolfe & Co. v. Phœnix Assur. Co., 484.

PENALTIES.

See Bankruptcy, ⊂=315, 317; Damages, ⊂=82.

PERJURY.

See Criminal Law, ⊂=365, 1186.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⊂=9(1) (U.S.C.C.A.Ohio) False swearing by a witness on hearing of a motion for preliminary injunction in a federal court *held* to constitute perjury, where the bill alleged facts showing diversity of citizenship which gave the court jurisdiction, although the testimony developed an identity of interest, between complainant and one of defendants which required the latter's alignment with complainant and defeated jurisdiction.—West v. U. S., 429.

II. PROSECUTION AND PUNISHMENT.

⊂=29(4) (U.S.C.C.A.Ohio) An indictment for perjury under Comp. St. § 1687, which averred that the oath was taken by accused "before" a District Judge named, *held* supported by proof that the oath was taken in open court presided over by such judge, and was administered by the deputy clerk of the court.—West v. U. S., 429.

PHYSICIANS AND SURGEONS.

See Criminal Law, ⊂=371, 815, 1186; Poisons, ⊂=2, 4, 9.

PLEADING.

See Equity, ⊂=345.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⊂=258(3) (U.S.C.C.A.N.Y.) In an action brought in New York against a Michigan corporation for breach of a contract to lease premises in New York, where the defendant corporation pleaded the New York statute of frauds as required, defendant's motion to amend at trial by pleading the Michigan statute of frauds, which would bring into the case the question whether its agent, who signed the memorandum relied on, was authorized in writing, should be denied because of surprise, although defendant was entitled to amend after motion on due notice.—Hotel Woodward Co. v. Ford Motor Co., 338.

XI. MOTIONS.

⊂=367(2) (U.S.C.C.A.Alaska) Where the matters involved were within defendant's knowledge, and after the opening statement of counsel defendant was granted a continuance, on the ground that matter had been brought out which was not anticipated, the denial of defendant's motion for plaintiff to make the complaint more definite and certain *held* not an abuse of discretion.—Cascaden v. Bell, 76.

⊂=367(6) (U.S.C.C.A.Alaska) A motion to require plaintiff to make his complaint more definite and certain is addressed to the court's sound discretion.—Cascaden v. Bell, 76.

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XIII. DEFECTS, AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT.

⇐409(1) (U.S.C.C.A.Ill.) Whether a covenant not to sue, running to two of the three tortfeasors, can be pleaded as a defense by the two in an action against the three, not determined, because plaintiff sought a determination in this one action of all issues.—Plunkett v. Levengston, 609.

PLEDGES.

See Receivers, ⇐77; Wills, ⇐743.

POISONS.

See Criminal Law, ⇐371, 815, 1186.

⇐2 (U.S.C.C.A.Mo.) Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), declaring that it shall be unlawful for any person to sell, barter, exchange, or give away enumerated narcotic drugs, except in pursuance of the written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, but excepting physicians duly registered in the course of their professional practice, is constitutional.—Thompson v. U. S., 264.

⇐4 (U.S.C.C.A.Mo.) Under Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), declaring that it shall be unlawful for any person to sell, barter, exchange, or give away certain narcotic drugs, except in pursuance of a written order of the person to whom such article is sold, on a form to be issued by the Commissioner of Internal Revenue, but which excepts physicians in the course of their professional practice, etc., it is an offense for a registered physician to sell narcotics.—Thompson v. U. S., 264.

⇐9 (U.S.C.C.A.Mo.) In a prosecution under Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), against a physician who sold large quantities of narcotics to habitual users of the drug, medical testimony as to recognized methods among physicians for treating persons addicted to the use of narcotic drugs was admissible for the purpose of showing that the accused physician did not come within the exception as to physicians dispensing drugs in the course of their practice, for, while the act is in the guise of a revenue measure, it was intended to accomplish a moral purpose.—Thompson v. U. S., 264.

In a prosecution against a physician for violating Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), by dispensing narcotics to habitual users of the drug, the exclusion of a letter from the Commissioner of Internal Revenue in response to a query by defendant physician as to dispensing of narcotics *held* proper.—Id.

In a prosecution for violation of Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), by a physician, who dispensed the drug to many habitual users, evidence *held* sufficient to sustain a conviction.—Id.

POOL.

See Negligence, ⇐51.

POST OFFICE.

See Bankruptcy, ⇐315, 317.

III. OFFENSES AGAINST POSTAL LAWS.

⇐32 (U.S.C.C.A.Mo.) In a prosecution for mailing an obscene, lascivious, and filthy letter, contrary to Criminal Code, § 211 (Comp. St. § 10381), the letter itself must directly or indirectly disclose its evil character, and it is improper to allow the jury to convict for an undisclosed, unexpressed intent in the mind of accused.—Sales v. U. S., 537.

POTTERY.

See Injunction, ⇐128.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRE-EMPTION STATUTE.

See Public Lands, ⇐139.

PREMIUMS.

See Internal Revenue, ⇐7.

PRESCRIPTION.

See Limitation of Actions.

PRINCIPAL AND AGENT.

See Appeal and Error, ⇐1053; Attorney and Client; Carriers, ⇐47, 69; Corporations, ⇐369, 642; Courts, ⇐274, 374; Evidence, ⇐355, 394; Frauds, Statute of, ⇐120; Pleading, ⇐258.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(E) Notice to Agent.

⇐177(3) (U.S.C.C.A.Ohio) Where plaintiff's representatives consulted with defendant contractor as to details of the subcontract which plaintiff had undertaken, information and knowledge so acquired by such representatives as to progress of defendant's work was that of plaintiff.—Gill v. Hale & Kilburn Co., 56.

PRINCIPAL AND SURETY.

See Appeal and Error, ⇐1241; Bail, ⇐75.

PRISONS.

See Criminal Law, ⇐1218.

PROCESS.

See Corporations, ⇐642; Courts, ⇐274

PROSTITUTION.

See Aliens; War, ⇐4.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, ⇐374.

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PUBLIC LANDS.

See Mines and Minerals, ⇐17–45.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(H) Grants in Aid of Railroads.

⇐82 (U.S.C.C.A.Idaho) Designation of railroad lieu lands by description which would apply to them after they should have been surveyed *held* not to describe them with a reasonable degree of certainty as required by Act March 2, 1899, when applied to land separated by 7½ miles of rough, mountainous, and timbered country from a known survey.—Farrell v. Edward Rutledge Timber Co., 229.

(I) Proceedings in Land Office.

⇐106(1) (U.S.C.C.A.Idaho) A land office decision, sustaining a lieu land selection upon authority of its previous decision that unsurveyed lieu lands listed by railway companies were designated with reasonable certainty by descriptions applicable to them after they should have been surveyed, *held* not a finding of fact that lands were described with reasonable certainty. —Farrell v. Edward Rutledge Timber Co., 229.

(K) Remedies in Cases of Fraud, Mistake, or Trust.

⇐120 (U.S.C.C.A.Colo.) In suit by the United States to cancel defendants' patents to certain lands, evidence *held* not to show that defendant entrymen, at the time of filing upon said lands, entered into an agreement by which the title to their respective pre-emption lands would inure to any other person in whole or in part.—U. S. v. Valley Land & Investment Co., 179.

In suit by the United States to cancel defendants' patents to certain lands on the ground that defendant entrymen in their affidavits and proofs falsely represented that lands were for their own exclusive use and benefit, the inquiry of the court could not extend beyond the good faith and truth of the statements required by Rev. St. § 2262, of the entryman at time of making entry.—Id.

⇐120 (U.S.C.C.A.S.D.) While the United States has the same remedy in equity for cancellation of a patent for fraud that an individual would have in case of his own deed, it has the burden of proof, and is subject to the same rule that the evidence must be clear and convincing. —U. S. v. Safe Investment Gold Mining Co., 592.

Where a suit by the government for cancellation of a patent is based upon fraud, plaintiff will be confined as a general rule strictly to that issue.—Id.

(M) Conveyances, Contracts, and Exemptions.

⇐139 (U.S.C.C.A.Colo.) The pre-emption statute (Rev. St. § 2262) did not require at time of making final proof, as it does at time of filing, that claimant make an affidavit to the effect that application is not made for the use or benefit of any other person or persons, and claimant had full power to dispose ad interim of his claim upon final issue of patent; the motive of applicant at time of final proof being irrelevant. —U. S. v. Valley Land & Investment Co., 179.

PUBLIC SERVICE COMMISSIONS.

See Judgment, ⇐713.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads.

RAILROADS.

See Contracts, ⇐101; Injunction, ⇐157, 163; Larceny, ⇐55; Master and Servant; Negligence, ⇐93; Public Lands, ⇐82, 106.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

⇐54 (U.S.C.C.A.La.) Though meat-packing companies, acquiring valuable abutting property adapted to their business, have a contract or property right to prevent removal from a street of an industry track serving them, they cannot have relief by injunction against the city, the railroad company, and a trackage company, to restrain removal of the track to another street, when it appears that paramount public interests may be interfered with by granting relief, especially where there is no convincing showing of a lack of legal remedy for damages.—Armour & Co. v. Texas & P. Ry. Co., 253.

X. OPERATION.

(F) Accidents at Crossings.

⇐350(7) (U.S.C.C.A.S.C.) In an action for injuries to soldiers riding in an army truck, struck by a train at a crossing, where there was evidence that defendant's employés had disregarded Code Civ. Proc. S. C. 1912, § 3222, requiring bell and whistle signals to be given on crossing highways, the issue of defendant's negligence was for the jury.—Charleston & W. C. R. Co. v. Alwang, 313.

⇐350(13) (U.S.C.C.A.S.C.) Evidence that soldiers, riding in an army truck struck by a train at a crossing, were racing with another truck just before the collision, *held* not to show as a matter of law that they were guilty of "gross or willful negligence," within Code Civ. Proc. S. C. 1912, § 3230, so as to bar recovery for injuries caused by failure to give statutory signals.—Charleston & W. C. R. Co. v. Alwang, 313.

RECEIVERS.

See Conspiracy, ⇐19; Injunction, ⇐157, 163; Insurance, ⇐177, 232; Judgment, ⇐713.

III. TITLE TO AND POSSESSION OF PROPERTY.

⇐74 (U.S.C.C.A.Mo.) Property in the hands of a receiver appointed by a court may not be interfered with, even to carry out private agreements, contracts, or trusts.—Mississippi Valley Trust Co. v. Railway Steel Spring Co., 362.

⇐77(1) (U.S.C.C.A.Mo.) A court, administering property already in its hands through a receivership, may properly draw to itself all disputes as to liens and other rights upon or pertaining to such property.—Mississippi Valley Trust Co. v. Railway Steel Spring Co., 362.

⇐77(4) (U. S. C. C. A. Mo.) In view of the controlling Missouri rule, District Court, on

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March 1, 1918, when it denied petition of trust company to vacate temporary injunction against its disposing of a railroad's bonds pledged as collateral to secure the note of the railroad, which was in the hands of a receiver for the marshaling of assets and their distribution at the suit of a steel spring company, *held* to have had jurisdiction to issue an injunctional order against the trust company, restraining it from the sale of the collateral, so that the order denying the petition to vacate the prior injunction was proper.—Mississippi Valley Trust Co. v. Railway Steel Spring Co., 362.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

⇐157 (U.S.C.C.A.N.J.) Receivers of an insolvent corporation, who brought it to a state of solvency and its business to such condition that it could shortly pay all its debts, secured and unsecured, from its earnings, *held* properly permitted to pay a dividend to unsecured creditors, to the exclusion of the holders of mortgage bonds on which interest was being paid as it accrued, and which were in litigation as to the question of their maturity because of prior defaults.—Todd v. Lippincott, 273.

RECEIVING STOLEN GOODS.

⇐7(2) (U.S.C.C.A.N.Y.) An indictment under Cr. Code, § 48 (Comp. St. § 10215), for receiving property stolen from the United States, which does not charge that the accused received or retained the property "with intent to convert to his own use or gain," is fatally defective.—Cohn v. U. S., 371.

⇐8(3) (U.S.C.C.A.N.J.) In prosecution under Penal Code, § 48 (Comp. St. § 10215), for having possession with intent to convert property stolen from United States, evidence *held* to sustain jury finding that property belonged to United States, despite mistaken references in shipping orders to date of contract under which government secured title.—Clark v. U. S., 453.

⇐8(4) (U.S.C.C.A.N.J.) In a prosecution for violation of Act Cong. Feb. 13, 1913 (Comp. St. §§ 8603, 8604), for feloniously having in possession certain plush knowing it to have been stolen from an interstate freight shipment, evidence, although circumstantial, *held* sufficient to sustain a verdict of guilty, based upon a finding that defendant had the requisite guilty knowledge that the goods were stolen.—Chass v. U. S., 631.

RECOGNIZANCES.

See Bail, ⇐75, 79.

RECORDS.

See Aliens, ⇐32; Appeal and Error, ⇐518, 1151; Assignments, ⇐46; Criminal Law, ⇐815, 1129, 1159; Trade-Marks and Trade-Names, ⇐43, 45, 85.

REFERENCE.

See Bankruptcy, ⇐223.

REFORMATION OF INSTRUMENTS.

See Bankruptcy, ⇐184.

RELEASE.

See Equity, ⇐436; Jury, ⇐16; Pleading, ⇐409; Removal of Causes, ⇐116; Subrogation, ⇐31.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⇐59 (U.S.C.C.A.Ill.) An instruction as to the validity and effect of a covenant not to sue, executed by plaintiff to certain defendants, *held* erroneous.—Plunkett v. Levengston, 609.

RELIGIOUS SOCIETIES.

See Criminal Law, ⇐657.

REMOVAL OF CAUSES.

VIII. PROCEEDINGS IN CAUSE AFTER REMOVAL.

⇐116 (U.S.C.C.A.Va.) Where a judgment at law, rendered by the federal District Court in West Virginia, was assigned to plaintiff's testator, and by plaintiff released through fraudulent misrepresentations, the release may be canceled in a suit brought in the state court of Virginia, sitting as a court of equity, and real estate may be attached to satisfy the judgment and removal of such suit for cancellation and enforcement to the federal court by defendant therein does not deprive plaintiff of her rights, under Code Va. 1904, § 2964, providing that, when a person has a claim, legal or equitable, exceeding $20, he may have a bill in equity for an attachment to secure and enforce it.—Miller v. Williams, 284.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error.

RULES OF COURT.

See Court Rules Cited.

RUSSIAN SUPPLY COMMITTEE.

See Ambassadors and Consuls, ⇐5½.

SALES.

See Action, ⇐22, 50; Ambassadors and Consuls, ⇐5½; Bankruptcy, ⇐166, 440; Conspiracy, ⇐19; Corporations, ⇐320, 642, 661; Criminal Law, ⇐371, 1186; Election of Remedies, ⇐3; Evidence, ⇐23; Jury, ⇐31; Poisons, ⇐2, 4, 9; Receivers, ⇐77; Trade-Marks and Trade-Names, ⇐80½.

VI. WARRANTIES.

⇐287(3) (U.S.C.C.A.Ohio) Where a buyer of a locomotive crane retained the same and used it for a long time, there was an acceptance, even though the buyer asserted in correspondence that it had not accepted the crane, because it did not comply with an asserted warranty.—O. C. Barber Mining & Fertilizing Co. v. Brown Hoisting Machinery Co., 139.

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VIII. REMEDIES OF BUYER.

(C) Actions for Breach of Contract.

⇐418(2) (U.S.C.C.A.Mo.) When contracts for the sale of chattels are broken by vendor failing to deliver, the measure of damages is the difference between the contract price and the market price of the article at the time when and the place where it should have been delivered, with interest; the place of delivery meaning the place where title passes.—Setton v. Eberle-Albrecht Flour Co., 625.

⇐418(12) (U.S.C.C.A.Mo.) If a buyer of chattels has, in advance, made a contract for resale, and discloses such fact to his vendor, who undertakes to furnish the commodity and deliver it at a specified time and place, so that the buyer may fulfill his resale contract, but the vendor fails to do so, he will be liable on the basis of the profits the vendee would have realized on his contract of resale.—Setton v. Eberle-Albrecht Flour Co., 625.

Where a flour merchant in Alexandria, Egypt, brought an action for breach of a contract to buy of a corporation in St. Louis, Mo., "2,000 bags 'White Owl' at 23/6 per 280 lbs., c. i. f. Alexandria, all August shipment," but failed to allege special damages, or facts showing an exception to the general rule of damages, the measure of damages was the difference between the contract price and the market price at St. Louis, and not the difference between the contract price and the market price in Alexandria; the contract not being one technically for resale, and the letters "c. i. f." merely meaning "cost, insurance, and freight."—Id.

(D) Actions and Counterclaims for Breach of Warranty.

⇐425 (U.S.C.C.A.Ohio) Under Gen. Code Ohio, § 8449, relating to breach of warranty, a buyer, on discovery of the breach, is at liberty either to return or offer to return the article and recover any part of the price paid, or to accept and keep the article and set up breach of warranty by way of recoupment, in diminution or extinction of the purchase price.—O. C. Barber Mining & Fertilizing Co. v. Brown Hoisting Machinery Co., 139.

⇐439 (U.S.C.C.A.Ohio) Where a buyer's retention and use of a locomotive crane prior to suit for the purchase price were sufficient to reveal the claimed defects, the buyer, who defended on the ground of such defects, has the burden of proving them.—O. C. Barber Mining & Fertilizing Co. v. Brown Hoisting Machinery Co., 139.

⇐442(14) (U.S.C.C.A.Ohio) Where a buyer of a locomotive crane, notwithstanding discovery of alleged defects, retained and used the crane, and as a result of asserted defects it dropped stones on a building when being used, *held*, that under Gen. Code Ohio, § 8449, relating to breach of warranty, damages arising out of such use of the crane cannot be recovered, where the buyer made no attempt to have the defects remedied.—O. C. Barber Mining & Fertilizing Co. v. Brown Hoisting Machinery Co., 139.

⇐445(1) (U.S.C.C.A.Ohio) Though Gen. Code Ohio, § 8395, specifies when implied warranties will or will not arise, yet where the facts on which such implied warranties might or might not arise are in conflict, the questions are for the jury.—O. C. Barber Mining & Fertilizing Co. v. Brown Hoisting Machinery Co., 139.

In an action for the purchase price of a locomotive crane, where the buyer defended on the ground that the crane did not comply with the implied warranty arising under Gen. Code Ohio, § 8395, because the seller was advised of the buyer's needs, etc., *held*, where there was testimony that the crane was sold under its patent or trade-name, and that the buyer's agents inspected the same, the question whether any implied warranty arose was for the jury.—Id.

SEAMEN.

See Constitutional Law, ⇐275.

⇐1 (U.S.C.C.A.N.Y.) Seamen's Act March 4, 1915, § 4 (Comp. St. § 8322), requiring payment to seamen on demand of half wages earned at every port where the vessel shall load or deliver cargo, as applied to foreign seamen on foreign vessels entering American ports, although subversive of their contracts, is constitutional.—The Westmeath, 462.

SEARCHES AND SEIZURES.

See Criminal Law, ⇐1165, 1166; Witnesses, ⇐298.

⇐7 (U.S.C.C.A.N.Y.) Under Const. Amend. 4, declaring against unreasonable searches and seizures, and Amend. 5, declaring that no person shall be compelled to be a witness against himself, it was an arbitrary and unlawful violation of defendant's constitutional rights for officers of the secret service to demand from his wife ledgers and delivery slips for use as evidence in a prosecution for conspiring to defraud the United States, and, where the wife delivered the same on demand, such documents are inadmissible in evidence.—Fitter v. U. S., 507.

SEDITION.

See Army and Navy, ⇐40; War, ⇐4; Witnesses, ⇐414.

SELECTIVE DRAFT ACT.

See Army and Navy, ⇐20, 40; Habeas Corpus, ⇐16; War, ⇐4.

SENTENCE.

See Criminal Law, ⇐991.

SET-OFF AND COUNTERCLAIM.

See Courts, ⇐332, 347; Equity, ⇐39.

SHIPPING.

See Admiralty, ⇐39; Evidence, ⇐394; International Law, ⇐10; Wharves.

III. CHARTERS.

⇐40 (U.S.C.C.A.N.Y.) Under a time charter for monthly hire for "about 36 months (term of charter party to be understood to mean a month more or less)," providing that, should the steamer be on a voyage toward the port of return delivery when a payment of hire be-

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comes due, payment shall be made for such length of time as the parties estimate as necessary to complete the voyage, the difference to be adjusted on delivery as the case may require, the charterer has a permitted underlap or overlap of one month, and for a greater overlap must pay at the market rate.—Prebensens Dampskibsselskabet A/S v. Munson S. S. Line, 295.

⇐44 (U.S.C.C.A.Fla.) Charterers of a schooner, entitled to the whole of the vessel, with the exception of necessary room for crew and storage of "provisions," sails, and cables, were not deprived of space to which they were entitled because the owners of the schooner stored on its deck in lockers 35 or 40 tons of coal to operate the donkey engine, heat the cabin, and discharge cargo.—The Addison E. Bullard, 248.

⇐49(5) (U.S.C.C.A.Fla.) A lien may be created by contract between the parties to a charter, not only for freight, but for dead freight, demurrage, and as many more of the usual claims of the shipowner as he may choose to name.—The Addison E. Bullard, 248.

Where the charter of a schooner stipulated that all freight to accrue was to be prepaid, that prepaid freight was to be considered as earned and to be irrevocable, and that the vessel had a lien for all freight, the lien was given and made enforceable for the freight from the time it was due to be prepaid, irrespective of whether the vessel had broken ground at the port of loading.—Id.

⇐58(2) (U.S.C.C.A.Fla.) On libel by the owners of a schooner against a cargo of lumber and timber, evidence *held* to support the conclusion that the timber and lumber carried on the so-called flush deck and the deck next thereunder constituted a full "deck load," within the meaning of the charter party stipulation on the subject.—The Addison E. Bullard, 248.

V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

⇐84(3) (U.S.C.C.A.Md.) A stevedore company, though it ordered its foreman to remove all hatch beams, etc., *held* charged with knowledge of noncompliance with order, so that it could not escape liability to a stevedore, injured by the falling of a beam on the ground the company had discharged its duty as to furnishing safe place, etc.—Patapsco Ship Ceiling & Stevedore Co. v. Siebert, 134.

⇐84(4) (U.S.C.C.A.Md.) The foreman of a stevedore company *held* a vice principal as to a stevedore, so the company could not escape liability for the foreman's negligence on the ground he was a fellow servant of the injured stevedore.—Patapsco Ship Ceiling & Stevedore Co. v. Siebert, 134.

VII. CARRIAGE OF GOODS.

⇐108 (U.S.C.C.A.Ohio) In an action against a West Virginia mining company for breach of a contract under which plaintiff was to transport by boat coal from the mine in West Virginia to a point in Ohio, whence it would be reshipped by rail, the question whether the contract required defendant to furnish coal for water shipment, regardless of whether it could obtain cars at its mine, *held*, under the evidence, for the jury.—Empire Fuel Co. v. Lyons, 40.

In an action by the plaintiff for breach of contract, which he asserted obligated the defendant mining company to furnish him 350 tons of coal per day for transportation by water, evidence *held* sufficient to support a finding by the jury that such was the parties' intention.—Id.

⇐126 (U.S.C.C.A.N.Y.) A stevedore, contracting to discharge a ship into lighters or scows, although his contract does not include trimming cargo, is bound to stop work, if and when it becomes unsafe to continue loading without trimming, and is liable to third parties injured, if he proceeds.—The Adah, 393.

A cargo owner, who has agreed to discharge the vessel, is not liable as principal for negligence of a stevedore with whom he contracts for such discharge, but is liable on his contract with the vessel for any injury to her resulting from such negligence.—Id.

XI. LIMITATION OF OWNER'S LIABILITY.

⇐209(1) (U.S.C.C.A.N.Y.) Parties to a proceeding for limitation of liability, who voluntarily appear or, after they are brought in, whether rightfully or not, join issues with petitioner and between themselves, and litigate questions of liability, are bound by the decree.—The Adah, 393.

SIGNATURES.

See Frauds, Statute of, ⇐120; Pleading, ⇐258.

SIGNALS.

See Railroads, ⇐350.

SOLDIERS.

See Bail, ⇐79; Negligence, ⇐93; Railroads, ⇐350.

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See Taxation, ⇐11.

STATUTE OF FRAUDS.

See Frauds, Statute of.

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STATUTES.

For statutes relating to particular subjects, see the various specific topics.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⇐184 (U.S.C.C.A.N.Y.) Statutes are to be given a rational and sensible construction, in view of the object sought to be obtained and the evil to be remedied.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

⇐219 (U.S.C.C.A.Ohio) Where the Internal Revenue Department decided a question under

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the Income Tax Law two ways, neither decision can be given the effect usually given to an established practice of an executive department.—U. S. v. Coulby, 165.

⟸228 (U.S.C.C.A.Mo.) A proviso in a statute must be strictly construed.—Thompson v. U. S., 264.

(B) Particular Classes of Statutes.

⟸245 (U.S.C.C.A.Or.) Statutes levying taxes should be construed, in case of doubt against the government and in favor of the citizen.—Miller v. Gearin, 293.

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SUBROGATION.

⇐1 (U.S.C.C.A.Mich.) Subrogation is not a matter of legal right, but merely the mode which equity adopts to compel the ultimate payment of a debt by one who in justice should pay it.—Escanaba Traction Co. v. Burns, 48.

⇐31(1) (U.S.C.C.A.Mich.) Where a traction company, which had employed a firm of contractors, did not pay in full the claim of a lender to and holder of an assignment from the contractors in settling with the attorney for the lender a judgment against it in favor of the contractors, as against other lenders to the

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contractors it was not entitled on any theory of subrogation to the benefit of the release of the security held by the lender, when judgment in favor of the contractors against the traction company was settled by the attorney for such lender; "subrogation" not being matter of legal right, but merely the mode which equity adopts to compel the ultimate payment of a debt by one who in justice should pay it.—Escanaba Traction Co. v. Burns, 48.

SUGAR.

See Evidence, ⇐23.

SUICIDE.

See Insurance, ⇐446.

SUNDAY.

⇐11 (U.S.C.C.A.Mich.) Though a lender to and holder of an assignment from a firm of contractors which did work for a traction company gave his consent on Sunday to a settlement of the contractors' claim against the traction company, the settlement was not, under the facts of this case, invalidated, though the statutes of both states where the transactions occurred make Sunday contracts invalid.—Escanaba Traction Co. v. Burns, 48.

⇐15 (U.S.C.C.A.Mich.) Where the lender to and holder of assignment from a firm of contractors which had done work for a traction company on Sunday gave consent to his attorney, acting also for others interested, to settle the contractors' judgment claim against the traction company, and did not withdraw the authority given during the two days which elapsed until the settlement was actually made, such lender and assignee is estopped from denying, as against the traction company, in suit to set aside satisfaction of judgment by it, that his consent to the settlement had legal efficacy.—Escanaba Traction Co. v. Burns, 48.

TAXATION.

See Commerce, ⇐69; Courts, ⇐107; Judgment, ⇐708; Internal Revenue; Municipal Corporations, ⇐374; Statutes, ⇐245; Trial, ⇐141.

I. NATURE AND EXTENT OF POWER IN GENERAL.

⇐11 (U.S.C.C.A.Ohio) Despite Federal Reserve Act Dec. 23, 1913 (Comp. St. §§ 9785–9805), under Rev. St. § 5219 (Comp. St. § 9784), stockholders of a national bank were not entitled, for purposes of the assessment of state, county, and municipal taxes, to any deduction of the value of their holdings on account of the bank's holdings of Federal Reserve Bank stock.—First Nat. Bank of Cincinnati v. Beaman, 17.

TELEGRAPHS AND TELEPHONES.

See Evidence, ⇐394.

THEATERS AND SHOWS.

See Army and Navy, ⇐40; Copyrights, ⇐50.

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See Injunction, ⇐101; Limitation of Actions, ⇐28; Payment, ⇐82, 89.

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TOWAGE.

See Collision, ⇐66, 71, 95, 96.

⇐11(9) (U.S.C.C.A.N.Y.) Injury to a tow in rough weather *held* not due to violation or negligent performance of the towage contract, which rendered the tug liable.—The Rosabel, 304.

⇐11(10) (U.S.C.C.A.N.Y.) A tug, which left a number of boats in tow fastened to a pier by a slip line over a pile, while she went after others, *held* in fault for injury to one of the boats by collision with another pier after the tow had gone adrift on the rising tide and in a high wind, which caused the line to slip over the top of the pile, on the ground that under the circumstances she should have seen that the tow was more securely fastened.—The Ganoga, 8.

TRADE COMMISSIONS.

See Constitutional Law, ⇐62, 80; Evidence, ⇐23; Trade-Marks and Trade-Names, ⇐80½.

TRADE-MARKS AND TRADE-NAMES.

See Constitutional Law, ⇐62, 80; Evidence, ⇐23.

I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

⇐1 (U.S.C.C.A.N.Y.) A "trade-mark" is a mark or symbol used by one who manufactures or sells goods to distinguish them from similar goods manufactured or sold by another.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

⇐3(2) (U.S.C.C.A.N.Y.) A word merely descriptive of a general character of a business cannot be used as a trade-mark.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

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⊂⊃3(4) (U.S.C.C.A.N.Y.) A word merely descriptive of an article cannot be used as a trade-mark.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

⊂⊃7 (U.S.C.C.A.N.Y.) A word merely descriptive of an article or the current name of an article, or of a general character of a business, cannot be used as a "trade-mark," which is a mark or symbol used by one who manufactures or sells goods to distinguish them from similar goods manufactured or sold by another.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

⊂⊃9 (U.S.C.C.A.N.Y.) A geographical name which does not indicate the origin or ownership of the goods and can be truthfully used by any other manufacturer or trader of the same locality cannot be a common-law trade-mark, unless there is no other who can truthfully use the name, or unless from the name, as applied to the article, it is manifest that it is used in a purely arbitrary sense.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

The word "Scandinavia" applied to the belting of a particular manufacturer is a descriptive geographical name, which cannot be a common-law trade-mark, though the belting is made in England; since it does not appear from the name itself that it is not the designation of the place of manufacture.—Id.

⊂⊃11 (U.S.C.C.A.N.Y.) The use of the word "Scandinavia" as a trade-mark of a patented belting does not give the public the right to use the trade-mark after the expiration of the patent, in the absence of evidence that the manufacturer had expressly or impliedly consented that such word should become the descriptive generic name of the article patented.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

⊂⊃21 (U.S.C.C.A.N.Y.) The use of a word as a trade-mark for a particular kind of belting manufactured in a foreign country does not preclude the courts of this country from protecting the trade-mark in so far as the goods to which it applied were sold here.—Scandinavia Belting Co. v. Asbestos & Rubber ber Works of America, 87.

III. REGISTRATION, REGULATION, AND OFFENSES.

⊂⊃43 (U.S.C.C.A.N.Y.) A corporation, to whom a foreign manufacturer had agreed to sell its products exclusively in this country and to give exclusive use of its trade-mark for a period longer than the period of registration, is an "owner" of the trade-mark entitled to register it under Act Feb. 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), the word "owner" in statutes being given a varied significance according to the context, and, even if the corporation is an agent of the manufacturer it is an agent with an interest and a special owner entitled to the benefit of the act.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

One who had exclusively used the word "Scandinavia" as his trade-mark for belting since 1892 is entitled, under the provision of the act of February 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), that nothing in the act should prevent the registration of a mark used exclusively as a trade-mark for more than 10 years preceding the act, to register it as a trade-mark; though it is a geographical word which could not be a trade-mark at common law.—Id.

⊂⊃45 (U.S.C.C.A.N.Y.) The registration of a trade-mark under Act Feb. 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), does not validate a trade-mark not previously valid, unless the trade-mark comes within the provision for the registration of any trade-mark exclusively used for ten years.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

The failure of the public to use the trade-mark of a patented article after the expiration of the patent, until after the trade-mark had been registered under the 10-year clause of the act of February 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), prevents the use of such trade-mark thereafter by any one but the owner.—Id.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(A) What Constitutes Infringement.

⊂⊃62 (U.S.C.C.A.Ill.) The practice of a saloon keeper of pouring gin from one of complainant's trade-marked bottles into another and serving drinks from the latter, due to the fact that customers preferred to pour from a nearly full, rather than a nearly empty, bottle, *held* not an infringement of complainant's trade-mark rights.—Gordon Dry Gin Co. v. Righeimer, 645.

⊂⊃66 (U.S.C.C.A.N.Y.) The owner of a registered trade-mark can restrain its use by another, though no loss of sales is shown and there may be no fraud between the original seller and buyer of the infringing article.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

(B) What Competition Unlawful.

⊂⊃67 (U.S.C.C.A.N.Y.) Where a geographical name originally used to indicate place of origin has acquired a secondary significance, indicating the name of the manufacturer or seller, and the excellence of the thing made or sold, it does not thereby become a common-law trade-mark, but its unfair use by others to deceive the public as to the origin or ownership of goods may be restrained as unfair competitor.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

⊂⊃69 (U.S.C.C.A.N.Y.) Actual fraud must be shown in a suit to restrain unfair competition, but the simulation of well-known and distinctive features of complainant's goods may be so close that the court can assume an intent to defraud.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

⊂⊃70(3) (U. S. C. C. A. N. Y.) Where it was shown that the term "Scandinavia" applied to belting was understood to mean plaintiff's product, in which it had built up a large business, and that defendant, in response to requests for such belting, had put out a product similar in appearance and designated as "Scandinavian belting," complainant was entitled to an injunction to restrain unfair competition.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

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(C) Actions.

⊂⊃80½ [New, vol. 8A Key-No. Series]
(U.S.C.C.A.Ill.) A finding by the Federal Trade Commission that a mail-order house doing an interstate business was guilty of unfair competition in selling sugars, teas, and coffees under representations that it had obtained special price concessions, because of the magnitude of its purchases, and that it purchased selected brands from abroad, *held* warranted.—Sears, Roebuck & Co. v. Federal Trade Commission, 323.

An order issued by the Federal Trade Commission, commanding a mail-order house doing an interstate business to cease and desist from certain unfair practices in connection with the sale of sugar and other staple commodities, *held* not to have been improvidently issued because the mail-order house had discontinued such methods, where it was contending that Act Sept. 26, 1914, § 5 (Comp. St. 8836e), creating the Federal Trade Commission was unconstitutional, or if valid, had not been infringed, and the government's control of sugar sales and consumption had temporarily put an end to the objectionable practices in any event.—Id.

Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission authority over unfair methods of competition, and declaring the same unlawful, is not void for indefiniteness because the words "unfair methods of competition" were not defined; the trader being entitled to his day in court, where common-law principles would control.—Id.

The Federal Trade Commission, under its authority to stop unfair methods of competition, cannot prevent a trader from selling a staple article as sugar below cost, although it may prevent such sales accompanied by representations which would injure other traders.—Id.

⊂⊃80½ [New, vol. 8A Key-No. Series]
(U.S.C.C.A.N.Y.) Act Sept. 26, 1914, § 5 (Comp. St. § 8836e), giving the Federal Trade Commission power to investigate unfair methods of competition, does not contemplate the prohibition of unfair methods of competition between individuals, there being no authority given to individuals to present grievances; hence, where defendants, who engaged in selling ties and bagging for cotton bales, refused to sell to persons with whom they had had previous unsatisfactory relations, and refused to sell ties without bagging when there was fear that, owing to the scarcity of ties and the prospect of large crops, the marketing of the cotton crop might be endangered by creating corners in ties, the commission is not authorized to make any order compelling such sales. The unfair methods contemplated by the act are such as affect the public generally.—Federal Trade Commission v. Gratz, 330.

⊂⊃85(1) (U.S.C.C.A.N.Y.) An attempt to register a trade-mark by one who was not the owner is not a fraud which bars the user's remedy for unfair competition, where he acted on a mistaken view of the law honestly entertained.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

The use of the word "Scandinavia" as a trade-mark for belting manufactured in England by the successors of one who had previously worked in Sweden is not a fraud, which prevents the owners of the trade-mark from seeking relief in equity; there being no evidence of intention to deceive or of deception as to the place of manufacture.—Id.

⊂⊃93(1) (U.S.C.C.A.N.Y.) Actual fraud must be shown in a suit to restrain unfair competition, but the simulation of well-known and distinctive features of complainant's goods may be so close that the court can assume an intent to defraud.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

⊂⊃97 (U.S.C.C.A.N.Y.) The right to a trade-mark is a property right entitled to the same protection as any other property right, and equity can restrain the use of such trade-mark by another under its power to protect property from irreparable damage.—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

V. TRADE-MARKS AND TRADE-NAMES ADJUDICATED.

"Scandinavia."—Scandinavia Belting Co. v. Asbestos & Rubber Works of America, 87.

TRADE SECRETS.

See Injunction, ⊂⊃128.

TRADE UNIONS.

See Conspiracy, ⊂⊃19, 21; Courts, ⊂⊃317; Injunction, ⊂⊃101.

TREASON.

See Army and Navy, ⊂⊃40; War, ⊂⊃4; Witnesses, ⊂⊃414.

TRESPASS.

I. ACTS CONSTITUTING TRESPASS AND LIABILITY THEREFOR.

⊂⊃11 (U.S.C.C.A.Mo.) The fresh water "mussel" a shellfish capable of locomotion, usually living in the bed of streams partially covered with mud, being a live animal, cannot be deemed part of the "realty," within Rev. St. Mo. 1909, § 5448, allowing treble damages in certain cases for digging up and carrying away any substance or material, being a part of the realty.—Gratz v. McKee, 351.

TRIAL.

See Criminal Law, ⊂⊃619–876½; Jury.
For trial of particular actions or proceedings, see also the various specific topics.
For review of rulings at trial, see Appeal and Error.

IV. RECEPTION OF EVIDENCE.

(C) Objections, Motions to Strike Out, and Exceptions.

⊂⊃85 (U.S.C.C.A.Ariz.) In action for failure to furnish live stock cars plaintiffs' telegrams and letter to defendant demanding cars and threatening to hold it liable for damages, etc., *held* admissible, and objection should have been specifically made to any self-serving portions thereof.—Southern Pac. Co. v. Stevens, 233.

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VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

⇐136(1) (U.S.C.C.A.Ohio) It is a general rule that questions of reasonable time and reasonable delay are for the jury.—Gill v. Hale & Kilburn Co., 56.

⇐141 (U.S.C.C.A.Mich.) Whether plaintiff, a foreign corporation, was doing business in Michigan, so as to be subject to the taxing laws of Michigan, *held* one of law; the evidence not being conflicting.—Hayes Wheel Co. v. American Distributing Co., 31.

(D) Direction of Verdict.

⇐169 (U.S.C.C.A.N.Y.) In an action in the federal District Court for New York, where the trial judge reaches a correct conclusion in favor of defendant after hearing all the evidence, the jury should be directed to enter a verdict in defendant's favor, and it is improper to merely enter an order dismissing the complaint.—Hotel Woodward Co. v. Ford Motor Co., 338.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

⇐193(1) (U.S.C.C.A.Ark.) In the federal courts, the judge, in charging the jury, may, whenever he thinks it necessary to assist them in arriving at a just verdict, express his opinion upon the facts, where he also states that his opinion is not binding upon them, and that they are the exclusive judges of the facts.—United Mine Workers of America v. Coronado Coal Co., 549.

(B) Necessity and Subject-Matter.

⇐211 (U.S.C.C.A.Ill.) In a civil action the jury may properly be instructed that it is justified in drawing inferences against defendants because of their failure to testify, and especially where facts in issue are peculiarly within their knowledge.—Plunkett v. Levengston, 609.

TROVER AND CONVERSION.

See Fish.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Appeal and Error, ⇐334; Bankruptcy, ⇐165; Courts, ⇐311, 347; Equity, ⇐39; Judgment, ⇐531; Receivers, ⇐74.

I. CREATION, EXISTENCE, AND VALIDITY.

(C) Constructive Trusts.

⇐110 (U.S.C.C.A.Alaska) Where complainant and defendant started out on a joint adventure for the location of mining claims, and together located and staked a claim in the name of both, and thereafter discovery was made, but before discovery defendant erased complainant's name from the claim and substituted the name of another, the rule that, in order to establish a constructive trust by parol evidence as against the holder of the legal title, the proof must be clear, definite, and satisfactory, does not apply, for complainant's rights do not rest alone upon evidence of a parol agreement, but upon joint acts of the parties, etc.—Cascaden v. O'Connor, 80.

TYPEWRITING.

See Contracts, ⇐168.

UNFAIR COMPETITION.

See Trade-Marks and Trade-Names, ⇐62–97.

UNITED STATES.

See Army and Navy; Bankruptcy, ⇐172, 328; Conspiracy, ⇐37, 47; Criminal Law, ⇐520, 780, 876½, 1171; Indictment and Information, ⇐4, 171; Navigable Waters, ⇐19; Public Lands, ⇐120; Receiving Stolen Goods, ⇐7, 8; Searches and Seizures, ⇐7; Witnesses, ⇐52, 298.

UNLOADING BRIDGE.

See Wharves, ⇐20.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

⇐37 (U.S.C.C.A.N.Y.) A transaction by which a legatee 44 years old, who had been refused life insurance by various companies, assigned an interest in a legacy payable only in case he reached the age of 55 for less than one-tenth of legacy's amount *held* not usurious.—Provident Life & Trust Co. v. Fletcher, 523.

VENDOR AND PURCHASER.

See Bankruptcy, ⇐198; Courts, ⇐311, 347; Equity, ⇐39, 436; Estoppel, ⇐98; Evidence, ⇐419, 461; Frauds, Statute of, ⇐33, 49; Judgment, ⇐678, 684; Sales.

VERDICT.

See Criminal Law, ⇐876½.

WAGES.

See Constitutional Law, ⇐275; Seamen, ⇐1.

WAR.

See Ambassadors and Consuls, ⇐5½; Army and Navy, ⇐20, 40; Bail, ⇐79; Collision, ⇐125; Constitutional Law, ⇐90; Criminal Law, ⇐338, 657, 778; Evidence, ⇐23; Habeas Corpus, ⇐16; Injunction, ⇐101; Internal Revenue, ⇐11; Witnesses, ⇐414.

⇐4 (U.S.C.C.A.Cal.) Under Const. art. 1, § 8, giving Congress the power to raise and support armies and make all laws which shall be necessary and proper for carrying into execution such powers, Act May 18, 1917, § 13 (Comp. St. 1918, § 2019b, appendix), authorizing the Secretary of War to do everything by him deemed necessary to suppress and prevent the keeping and setting up of houses of ill

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fame within such distance as he may deem needful of military camps, and making the keeping of any house of ill fame within the designated distance a misdemeanor, is valid.—Grancourt v. U. S., 163.

In a prosecution for violating Act May 18, 1917, § 13 (Comp. St. 1918, § 2019b, appendix), by setting up a house of ill fame within the distance prescribed by the Secretary of War, testimony by police officers, repeating questions asked of defendant by soldiers as to character of her establishment, transactions with such women, etc., *held* properly admitted.—Id.

⇐4 (U.S.C.C.A.Cal.) The provisions of Selective Draft Act May 18, 1917, § 13 (Comp. St. 1918, Append. § 2019b), authorizing the Secretary of War to take action to prevent the keeping of houses of prostitution, etc., in the vicinity of military camps or posts, extended to naval camps by Act Oct. 6, 1917 (Comp. St. 1918, § 2813e), is not unconstitutional, as an attempt by Congress to exercise police powers within the states.—Blanc v. U. S., 641.

⇐4 (U.S.C.C.A.N.Y.) In a prosecution under Espionage Act, instruction regarding defendant's right to freedom of speech, and power of Congress to enact laws abridging such freedom in time of war, *held* not improper.—Dodge v. U. S., 316.

The Espionage Act is constitutional.—Id.

⇐4 (U.S.C.C.A.S.C.) In an indictment for violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), by willfully making false reports or statements with intent to interfere with the operation or success of the military or naval operations of the United States, when the United States was at war, it is unnecessary to aver that such statements were made in the presence or hearing of persons in the military or naval service, or subject to military or naval duty.—Hickson v. U. S., 587.

Evidence *held* to sustain a verdict finding defendant guilty of violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c) by making false statements with intent to interfere with the military or naval operations of the United States when at war.—Id.

Espionage Act, § 3 (Comp. St. 1918, § 10212c), *held* constitutional.—Id.

WATERS AND WATER COURSES.

See Appeal and Error, ⇐781; Fish, ⇐1; Navigable Waters.

WHARVES.

⇐20(1) (U.S.C.C.A.Md.) A dry dock company, employed to make repairs to the exterior of the hull of a steamship, *held* not required to furnish steam for heating the interior while the work was being done, nor liable for injury caused by freezing of the steam pipes, where the master and crew remained on board and in charge.—The Kennebec, 290.

⇐20(1) (U.S.C.C.A.Wis.) The collapse during a storm of a steel unloading bridge on respondent's coal dock weighing 1,200 tons, new and of approved and modern construction, by which libelant's vessel was injured, *held* not due to negligence which rendered respondent liable, but to the entirely unusual violence of the storm which could not reasonably have been anticipated.—Niagara Transit Co. v. Northwestern Fuel Co., 613.

WILLS.

See Executors and Administrators; Removal of Causes, ⇐116; Usury, ⇐37.

VI. CONSTRUCTION.

(A) General Rules.

⇐442 (U.S.C.C.A.Ohio) The clearly expressed intention on the part of testator as to interest devised should govern, unless forbidden by law.—Youtsey v. Niswonger, 154.

(E) Nature of Estates and Interests Created.

⇐607(1) (U.S.C.C.A.Ohio) Where an Ohio testator devised lands to his children for their natural life, directing that on their death the property should go to the heirs of their body, but if any should die without leaving heirs of their body the lands, subject to the rights of curtesy or dower of the spouses of such children, should revert back and be divided equally between those living or their heirs per stirpes, *held*, under Gen. Code Ohio, §§ 8622, 10578, that a son of testator did not take an estate in fee, but his estate ended with his life and his issue took in fee simple.—Youtsey v. Niswonger, 154.

(F) Vested or Contingent Estates and Interests.

⇐629 (U.S.C.C.A.Ohio) The laws favor the vesting of estates, and they will be regarded as so vesting at the death of the testator, unless a contrary intention appears.—Youtsey v. Niswonger, 154.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

⇐743 (U.S.C.C.A.N.Y.) When a well-educated man 44 years old, with independent means, conveys his interest under a contingent legacy for a small fraction of the legacy's amount, the transaction will not be set aside as a "catching bargain," which merely describes that kind of fraud often perpetrated upon young, inexperienced, or ignorant people.—Provident Life & Trust Co. v. Fletcher, 523.

An absolute assignment of certain rights in a legacy under a specified item of a will did not extinguish rights previously secured through an assignment pledging an interest in legacy under another item of same will.—Id.

WITNESSES.

See Criminal Law, ⇐657, 1159; Evidence.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

⇐48(1) (U.S.C.C.A.N.Y.) It was the judgment of conviction of an infamous crime which at common law made the convict incompetent as a witness; hence defendant cannot complain that two of those indicted with him who had pleaded guilty were allowed to withdraw their pleas and permitted to testify, though

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they had confessed themselves guilty of a felony.—Fitter v. U. S., 507.

The testimony of persons convicted of crime is admissible in the federal courts, and the conviction goes simply to the credibility and weight of their testimony.—Id.

⇐52(1) (U.S.C.C.A.N.Y.) In a prosecution for conspiring to defraud the United States, the fact that the trial court declined to allow defendant's wife to testify, on the ground that the competency of witnesses in a criminal case is governed by the common-law rules in force when Judiciary Act 1789 was passed, is no ground for reversal.—Fitter v. U. S., 507.

III. EXAMINATION.

(C) Privilege of Witness.

⇐298 (U.S.C.C.A.N.Y.) Under Const. Amend. 4, declaring against unreasonable searches and seizures, and Amend. 5, declaring that no person shall be compelled to be a witness against himself, it was an arbitrary and unlawful violation of defendant's constitutional rights for officers of the secret service to demand from his wife ledgers and delivery slips for use as evidence in a prosecution for conspiring to defraud the United States, and, where the wife delivered the same on demand, such documents are inadmissible in evidence.—Fitter v. U. S., 507.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(E) Contradiction and Corroboration of Witness.

⇐414(1) (U.S.C.C.A.S.C.) In a prosecution for violating Espionage Act June 15, 1917, wherein defendant asserted that he had always been a loyal citizen, and that he had tendered his services to the government in the war before charges were brought against him, it was error to exclude evidence as to whether he had received an acknowledgment from the government for offering his services, and whether he had it with him; the case turning on defendant's credibility.—Caughman v. U. S., 450.

WORDS AND PHRASES.

"Cancellation."—Hanson v. Royal Ins. Co. (Tenn.) 3.
"Catching bargain."—Provident Life & Trust Co. v. Fletcher (N. Y.) 523.
"C. i. f."—Setton v. Eberle-Albrecht Flour Co. (Mo.) 625.
"Coke."—Otto Coking Co. v. Koppers Co. (Del.) 208.
"Deck load."—The Addison E. Bullard (Fla.) 248.
"Discovery."—U. S. v. Safe Investment Gold Mining Co. (S. D.) 592.
"Dividend."—Lederer v. Penn Mut. Life Ins. Co. (Pa.) 167.
"Docked."—Snare & Triest Co. v. St. Paul Fire & Marine Ins. Co. (N. Y.) 441.
"Documents and papers."—Cohn v. U. S. (N. Y.) 371.
"Enter."—Tama Miyake v. U. S. (Hawaii) 20.
"Expiration."—Hanson v. Royal Ins. Co. (Tenn.) 3.
"Finally past and clear."—The New York Central No. 28 (N. Y.) 493.
"Final order."—National Brake & Electric Co. v. Christensen (Wis.) 600.
"Fish."—Gratz v. McKee (Mo.) 351.
"Forgery."—Provident Life & Trust Co. v. Fletcher (N. Y.) 523.
"Income."—Miller v. Gearin (Or.) 293.
"Making."—Carbon Steel Co. v. Lewellyn (Pa.) 473.
"Manufacturing shells."—Carbon Steel Co. v. Lewellyn (Pa.) 473.
"Mussel."—Gratz v. McKee (Mo.) 351.
"Nonsuit."—Hotel Woodward Co. v. Ford Motor Co. (N. Y.) 338.
"Official."—Cohn v. U. S. (N. Y.) 371.
"Official documents."—Cohn v. United States (N. Y.) 371.
"Owner."—Scandinavia Belting Co. v. Asbestos & Rubber Works of America (N. Y.) 87.
"Parties."—The Adah (N. Y.) 393.
"Pearl fishing."—Gratz v. McKee (Mo.) 351.
"Penalty."—U. S. v. Birmingham Trust & Savings Co. (Ala.) 502.
"Person manufacturing * * * shells * * * or any part of any of the articles mentioned."—Carbon Steel Co. v. Lewellyn (Pa.) 473.
"Place of delivery."—Setton v. Eberle-Albrecht Flour Co. (Mo.) 625.
"Provisions."—The Addison E. Bullard (Fla.) 248.
"Realty."—Gratz v. McKee (Mo.) 351.
"Representation."—Manners v. Morosco (N. Y.) 497.
"Subrogation."—Escanaba Traction Co. v. Burns (Mich.) 48.
"Suicide, sane or insane."—United States Fidelity & Guaranty Co. v. Blum (Wash.) 617.
"Sum other than dividend."—Lederer v. Penn Mut. Life Ins. Co. (Pa.) 167.
"To date of payment."—Agency of Canadian Car & Foundry Co. v. American Can Co. (N. Y.) 379.
"Trade-mark."—Scandinavia Belting Co. v. Asbestos & Rubber Works of America (N. Y.) 87.

WORK AND LABOR.

See Logs and Logging, ⇐8.

WORKMEN'S COMPENSATION ACTS.

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WRIT OF ERROR.

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WRITS.

See Execution; Habeas Corpus; Injunction.

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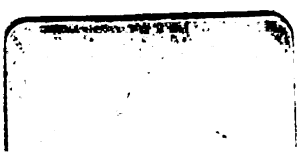

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